Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

AMCOR CAPITAL CORPORATION,
a Delaware corporation, et al.,

Petitioners,

v.

WILBUR GOOLKASIAN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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161 pp

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") sanction an error by the district court in finding that this case was not timely brought, in that (a) the Ninth Circuit's decision granting summary judgment on the statute of limitations issue was in conflict with its own decisions and the decisions of other Courts of Appeals, and (b) the lower courts ignored evidence of a continuing conspiracy involving one or more overt acts during the statutory period?

2. If the statute of limitations had indeed run, did the lower courts err in failing to toll the statute of limitations because of the unresolved conflict in the law of the Ninth Circuit relating to the appropriate statute of limitations to be applied to this case?

3. If the statute of limitations had indeed run, did the lower courts err in failing to toll the statute of limitations based on defendants' fraudulent concealment of the facts relating to plaintiffs' claims?

4. If the statute of limitations had indeed run, did the lower courts err in failing to toll the statute of limitations based on plaintiffs' pursuit of alternate remedies?

QUESTIONS PRESENTED – Continued

5. Should the same tolling provisions applicable to state peace officers also be held to apply to federal investigators being sued in *Bivens*[1] actions? If so, did the lower courts err in failing to toll the statute of limitations based on the fact that a criminal investigation was pending against plaintiff Amcor Capital Corporation?

6. Did the lower courts err in holding that plaintiffs' claim for unlawful disclosure of tax return and financial information was barred by the statute of limitations?

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[1] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

LIST OF ALL PARTIES TO THE PROCEEDING AND LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES REQUIRED BY RULE 29.6

This is an action for damages for violation of constitutional rights, conspiracy to violate constitutional rights, invasion of privacy, and unlawful disclosure of tax return and financial information brought directly under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution for violations of plaintiffs' constitutional rights by federal officials acting under color of federal authority, as recognized in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) and for violation of 42 U.S.C. sections 1983 and 1985(3) and 26 U.S.C. sections 7431, 6103 and 7430.

The plaintiffs and appellants in this proceeding are Amcor Capital Corporation, a Delaware corporation; Fred H. Behrens, individually and as general partner for certain listed Amcor partnerships; and Robert A. Wright, individually and as general partner for certain Amcor limited partnerships. The Amcor limited partnerships which are involved in this matter as plaintiffs are Ag-Capital Fund – 1983; Agri-Cal Venture Associates; Agri-Venture II; Agri-Venture Associates – 1984; Agri-Venture Fund; Agri-Venture – 1985; Albany Pecan Associates; AMAGCO Equipment, Ltd.; AMCOR Coachella Income Fund; AMCOR Sheltered Fund I; AMCOR Realty Fund III; Brundage Farming Associates (Unit I); Brundage Farming Associates (Unit II); Canyon Desert Vineyards; CBS Ranches, Inc.; Coachella Grape Associates; Coachella 15% Income Fund; Coachella Fruit Growers; Coachella-85

LIST OF ALL PARTIES TO THE PROCEEDING AND LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES REQUIRED BY RULE 29.6 – Continued

Partners; Coastal Varietal Vineyards – 1982; Columbia Farm Equipment, Ltd. (Unit I); Columbia Farm Equipment, Ltd. (Unit II); Columbia Basin Growers; Crop Associates – 1986; D.E.C. Agricultural Resources; Desert Flame Growers; Desert Highland Vineyards; Desert Vineyard Associates – 1982; Dixie Pecan Associates; Dixie Venture-1985; Dixie Delano Growers; Dixie Ventures-1986; Dixie Pacific Equipment, Ltd.; Dixie-Coachella Vineyards, Ltd.; Double M. Farms, Ltd.; Early Flame Associates; El Rancho Vineyard Partners; Emperor Ranch Associates; Emperor Seedless '85; Ethanol Research, Ltd.; Growers Leasing Associates; Houston Farm Associates; Houston Farm Associates II; Indio Date Associates; IVA-1984 Limited Partnership; IVA-1985 Limited Partnership; Lake Valley Realty Partners; Liberty Vista Vineyards, Ltd.; Lifemark Farming Associates; Maine Agricultural Enterprises; Maine Vineyard Enterprises; Mandarin House Vineyards; Meramec Farms, Ltd.; MNC Agricultural Resources; Mopak Farms, Ltd.; N.P. Farming, Ltd.; Oasis Date Associates; Pacific Farm Associates; Pecan Diversified Growers; Pump Station III Associates; Rancho Madera Partners; Rancho California Partners II; Rancho California Partners; Richgrove Grape Associates; Rio Verde – 1984; Rivercrest Vineyards, Ltd.; Salton Vista Vineyards; San Joaquin Grape Associates; Sandhollow Vineyard Associates; Santa Rosa Vineyards; Shandon Varietal Growers; Southwest Farm Venturers II; Southwest Farm Ventures; Southwood Pecan Growers; Specialty Farm Associates; SRF Ag-Fund IA; SRF Ag-Fund I; SRF AG-Resources-1980 (Unit I); SRF Ag-Resources-1980

LIST OF ALL PARTIES TO THE PROCEEDING AND LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES REQUIRED BY RULE 29.6 – Continued

(Unit II); SRF Ag-Fund IB; SRF Ag-Leasing Partnership; Tex-Cal Grape Associates; Texas Farm Venturers-84; Texpac Farming Fund; Travertine Flame Associates; Tulare Country Growers; U.S. Farming Associates; US Farm Partners-85; US Farm Partners-86; US Farm Partners-84; USB Flame Growers; USB-85 Associates; USB-86 Associates; Valley Vintage Growers; Vineyard Venture Fund; Vista Ag Realty Partners; Vista Grande Vineyards, Ltd.; Western Agricultural Venture Associates; and YFC-84.

The defendants and respondents in this proceeding are Wilbur Goolkasian, Phillip Larson, James Laurence, Miles D. Friedman, Joe Mudd, Harry M. Asch, William K. Shipley, George Martin, Vincent Capobianco, Bobby Jack Tadlock, Tom Phillips, Allen Silverman, Lynda Winter, Michael Rickus, Douglas Watson, Pete Tagni, Wayne McEwan, Gayle Morin, Jesse Cota, Robert Nied, Naomi Coy, and the United States of America.

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States ("Supreme Court Rules"), the only corporate party in this proceeding, Amcor, hereby states that it has no parent corporations and no subsidiaries which are not wholly owned.

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PETITION FOR WRIT OF CERTIORARI

Plaintiffs, appellants and petitioners Amcor Capital Corporation ("Amcor") et al. respectfully petition that a writ of certiorari issue to review the unpublished opinion of the United States Court of Appeals for the Ninth Circuit (hereafter "Court of Appeals" or "Ninth Circuit") filed and entered on January 15, 1997.

OPINIONS BELOW

On January 15, 1997, the Ninth Circuit issued its order ("the Ninth Circuit order") affirming the judgment of the district court in this case in a one-sentence opinion: "The judgment of the district court is AFFIRMED substantially for the reasons stated in that court's orders." Neither the Ninth Circuit order nor the judgment of the district court, which is set forth in two simultaneously-issued orders (hereafter collectively "the district court orders"), has been reported. The Ninth Circuit order and the district court orders are reproduced in the attached appendix, beginning at App. 1. No rehearing was sought of the Ninth Circuit order.

BASIS FOR JURISDICTION IN THIS COURT PURSUANT TO RULE 14(1)(e)

The Ninth Circuit order of which review is hereby requested was filed and entered on January 15, 1997, and this petition is therefore timely. As stated above, no rehearing was sought. No extension of time to file this petition has been requested. This Court has jurisdiction to

review the Ninth Circuit order under 28 U.S.C. sections 1254(1) and 2101(c). Subsections (iii) and (v) of Rule 14(1)(e) are inapplicable to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are voluminous and are therefore provided herewith as part of the Appendix. These provisions are: United States Constitution, Amendments I, IV, V, VI, and XIV; 26 U.S.C. sections 6103, 7430, and 7431; 42 U.S.C. sections 1983 and 1985(3); California Code of Civil Procedure sections 335, 340(3), and 343; California Government Code section 945.3; and California Penal Code section 830.8(a).

STATEMENT OF THE CASE

A. The Nature of the Case

This action, filed on October 12, 1994 by Amcor and the general partners of various Amcor limited partnerships against the United States and present and former employees of the Internal Revenue Service, the United States Attorney for the Northern District of Texas, and the Department of Justice, seeks to recover damages directly under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution for violations of plaintiffs' constitutional rights by federal

officials acting under color of federal authority, as recognized in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) ("*Bivens*"), and for violations of 42 U.S.C. sections 1983 and 1985(3) and 26 U.S.C. sections 7431, 6103, and 7430. The First Amended Complaint asserts four claims for relief; three of them are *Bivens* claims asserted against the individuals, and the fourth is a statutory claim asserted against the United States for unlawful disclosure of tax return and financial information.

The action arises from, and asserts, a continuing pattern of abusive and illegal activity against plaintiffs by the defendants in their official capacity as federal employees. The First Amended Complaint sets forth at length the defendants' vendetta against Amcor, which had done nothing illegal, and their conspiracy to destroy Amcor, its principals, and the limited partnerships which Amcor syndicated, in order to wrongfully seize Amcor's assets. Pursuant to this conspiracy, defendants initiated a number of purported "investigations" of Amcor (administrative, criminal, and civil), none of which ever resulted in any formal charges being brought against Amcor. (Exc. 3, CR[1] 3, pp. 16-26, ¶¶ 28-47.) The specific acts committed by the defendants include:

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[1] The terms "Exc." and "CR" refer to the record on appeal. For instance, "Exc. 3" refers to the document which is the third document in the Excerpts of Record required by the Ninth Circuit, i.e., the First Amended Complaint. The "CR" (Clerk's Record) refers to the document which was third on the docket of the district court clerk. In this case the numbers were usually identical.

1) Violating Department of Justice procedures and statutory procedures by the wholesale issuance of non-prosecution agreements to persons who purported to be "informants" against Amcor (Exc. 3, CR 3, pp. 16-17, ¶ 28);

2) Instigating without approval or authority telephone and videotape monitoring of conversations between these alleged "informants," Amcor, and Amcor's attorney (Exc. 3, CR 3, p. 15, ¶¶ 29-30);

3) Violating internal agency and statutory procedures regarding the manner in which investigations are supposed to be handled (Exc. 3, CR 3, pp. 17-18, ¶ 31, pp. 21-22, ¶ 39);

4) Failing to advise Amcor representatives of their constitutional rights against self-incrimination while a criminal investigation (which never resulted in any indictments) was pending (Exc. 3, CR 3, pp. 17-18, ¶ 31);

5) Failing to disclose the existence of ongoing investigations and representing that only a routine audit was occurring, while IRS agents were present in Amcor's offices on a daily basis interviewing Amcor personnel and copying virtually all of the documents relating to Amcor partnerships (Exc. 3, CR 3, pp. 17-18, ¶ 31);

6) Making one of Amcor's lawyers the target of a criminal investigation for the sole purpose of obtaining authority to monitor his conversations, in violation of stringent IRS and Department of Justice procedures (Exc. 3, CR 3, pp. 18-19, ¶¶ 32-35);

7) Using evidence obtained in the illegally monitored conversations to obtain an overly-broad search

warrant which was used to search and effectively ransack Amcor's premises (Exc. 3, CR 3, pp. 19-20, ¶ 36);

8) Making false representations to the Court to obtain the search warrant and deliberately and repeatedly ignoring and excluding exculpatory evidence (Exc. 3, CR 3, pp. 19-20. ¶ 36);

9) Using the search warrant as a pretense for invading Amcor's premises with 25 armed agents and taking virtually all of Amcor's records, which threatened Amcor's very existence, when in fact the IRS had already had access to all of these records or could have had access merely by an administrative summons (Exc. 3, CR 3, pp. 19-21, ¶¶ 36-37);

10) Repeatedly invading Amcor's attorney-client, work-product, and joint-defense counsel privileges (Exc. 3, CR 3, p. 21, ¶ 38, p. 23, ¶ 43);

11) Continuing this conspiracy even after learning that Amcor had been "set up" by a fellow federal employee who had taken bribes from farmers under contract to Amcor to mislead Amcor officials about the extent of their farming activities and to increase the amounts they were paid for contracting with Amcor to farm crops (Exc. 3, CR 3, p. 21, ¶ 38);

12) Causing the illegally obtained search warrant and the false affidavit submitted in support of the search warrant to be leaked to the press in order to smear Amcor's name and to chill Amcor's protests (Exc. 3, CR 3, p. 21, ¶ 38);

13) Issuing so-called "thirty-day" letters (warnings by the IRS that adjustments will be made on tax

returns, which trigger taxpayer appeal rights) to six Amcor partnerships, which were later withdrawn because they were issued for ulterior motives, i.e., to induce Amcor's limited partners to cooperate with the IRS' criminal investigation of Amcor in violation of their Fifth Amendment rights (Exc. 3, CR 3, p. 22, ¶ 40);

14) Improperly disclosing confidential tax return information relating to plaintiffs (Exc. 3, CR 3, pp. 22-23, ¶ 41);

15) Destroying documents which would have shown what they had done, in order to avoid having to produce the documents in discovery in related civil litigation, in direct violation of IRS document retention policies (Exc. 3, CR 3, p. 23, ¶ 42);

16) Committing perjury (Exc. 3, CR 3, p. 23, ¶ 42);

17) Obstructing plaintiffs' constitutional rights to petition Congress for redress of their grievances by lying to Congress (Exc. 3, CR 3, p. 23, ¶ 44);

18) Convening a grand jury to investigate Amcor without disclosing exculpatory evidence (Exc. 3, CR 3, pp. 23-24, ¶ 45);

19) Deliberately refusing to promptly notify plaintiffs of the termination of the grand jury in order to prejudice them in certain civil lawsuits and to give the IRS time to gather information to pursue civil tax cases against Amcor (Exc. 3, CR 3, p. 24, ¶ 46);

20) "Stonewalling" civil litigation in order to prohibit plaintiffs from uncovering this unlawful conspiracy through normal discovery channels (Exc. 3, CR 3, p. 25, ¶ 47);

21) Failing to afford plaintiffs procedural and substantive due process (Exc. 3, CR 3, p. 25, ¶ 47); and

22) Covering up all of these improper and illegal activities (Exc. 3, CR 3, p. 25, ¶ 47).

B. The Course of Proceedings and Disposition in the District Court

Shortly after the First Amended Complaint was filed and served, in or about early 1995, the United States and the individual defendants filed 22 separate but largely duplicative motions to dismiss the case, or in the alternative, for summary judgment. While the motions addressed the merits of the action and whether appropriate standards for pleading were met, the motions also addressed the issue of the statute of limitations. Defendants contended that all four claims for relief were time-barred, relying upon a declaration executed by Edward M. Robbins, Jr., counsel of record for the defendants in this case, purporting to authenticate certain documents including letters written by Amcor and its attorneys which, defendants claimed, showed that plaintiffs were allegedly aware of the substance of the allegations made in this action several years before the original Complaint was filed.

In opposition to these motions, Amcor submitted declarations of plaintiffs Fred Behrens and Robert Wright and

the declaration of Daniel L. Merriman, an attorney for Amcor, which contained evidence that the relevant facts on which this lawsuit is based were fraudulently concealed from Amcor, and that Amcor was prevented by the defendants' actions from learning of these facts until certain discovery took place in related litigation in 1994, the same year that this lawsuit was filed. (Exc. 40, CR 40, pp. 2-16, ¶¶ 2-34.) The Merriman Declaration further showed that the exhibits to the Robbins Declaration on which defendants were relying contained facts which were incorrect and that plaintiffs did not base this lawsuit on those alleged facts. (Exc. 40, CR 40, pp. 2-16, ¶¶ 4-34.) Additionally, in "Plaintiffs' Statement of Genuine Issues in Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment," plaintiffs demonstrated numerous instances where the information supposedly contained in the exhibits to the Robbins Declaration was not the same information on which this lawsuit was based, and that the information contained in those exhibits did not put plaintiffs on notice of the violations which they ultimately discovered in 1994. (Exc. 43, CR 43, pp. 2-5.) Accordingly, plaintiffs did not have sufficient notice of the facts underlying the allegations set forth in this lawsuit in order to trigger the running of the statute of limitations prior to 1994. In addition, Amcor also requested, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure ("F.R.C.P."), that additional time be allowed to take discovery to defeat the motions. (Exc. 37, CR 37, p. 2, lines 13-22.)

The district court ruled on these motions in the two district court orders, hereafter referred to as the "U.S. Order" and the "Individuals' Order," which were issued

on June 13, 1995. In the U.S. Order, as to the Fourth Claim for Relief for unlawful disclosure of tax return and financial information, the district court granted summary judgment on the ground that the claim was time-barred under the two-year statute of limitations provided in 26 U.S.C. section 7431(d). The court agreed with the United States' argument that Amcor was aware of the government's misconduct "long before 1994." (Exc. 48, CR 48, pp. 5-12.) However, the court completely failed to address any of the evidence of fraudulent concealment submitted by plaintiffs. Moreover, the court failed to distinguish in any way between the allegations in the First Amended Complaint and the allegations in the purported exhibits to the Robbins Declaration, which in many cases are dissimilar.[2]

In the Individuals' Order, the court ruled that the first three (*Bivens*) claims for relief against the individuals were barred by California's one-year personal injury statute of limitations codified in California Code of Civil Procedure ("C.C.P.") section 340(3). (Exc. 49, CR 49, pp. 9-12.) The court rejected Amcor's contention that its claims were subject to the four-year statute of limitations codified in C.C.P. section 343 as determined by the Ninth Circuit in *Gerritsen v. Consultado General de Mexico*, 989 F.2d 340, 343 (9th Cir. 1993), *cert. denied*, 510 U.S. 828 (1993). Instead, the court relied on other decisions of the

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[2] The Court dismissed Amcor's First, Second and Third Claims for Relief as to the United States with Amcor's concurrence on the ground that such claims could not as a matter of law be brought against the United States. The dismissal of these claims was not appealed.

Ninth Circuit which directly conflict with *Gerritsen, e.g., Matthews v. Macanas,* 990 F.2d 467, 469 (9th Cir. 1993) and *Van Strum v. Lawn,* 940 F.2d 406, 410 (9th Cir. 1991). As in the U.S. Order, the court also rejected Amcor's contentions that the statute of limitations had been tolled and ruled that Amcor was aware of the alleged conspiracy "at the latest by June 17, 1992." (Exc. 49, CR 49, p. 22, lines 5-10.) Accordingly, the court granted the individuals' motion for summary judgment and denied in part the individuals' motion to dismiss.

The lower court did not address, in either order, plaintiffs' request for additional time to take discovery to defeat the motions pursuant to Rule 56(f). (Exc. 37, CR 37, p. 2, lines 13-22.)

C. Disposition in the Ninth Circuit

The case was timely appealed to the Ninth Circuit on July 12, 1995. On January 15, 1997, the Ninth Circuit issued the order set forth at App. 1, which affirmed the district court orders.

D. The Basis for Jurisdiction in the Lower Courts

Jurisdiction in the district court was properly based on 28 U.S.C. section 1331 in that the action sought relief directly under the U.S. Constitution and statutory law. Jurisdiction in the Court of Appeals was properly based on the fact that the district court orders granting summary judgment to the defendants constituted the final relief in the case, as plaintiffs were advised by the district

court that no further orders or rulings (such as a judgment) would be issued. Since the distict court orders were final rulings terminating the action, they were appealable. *See Allen v. Veterans Admin.*, 749 F.2d 1386, 1388 (9th Cir. 1984).

REASONS FOR CERTIORARI

I. THE COURT OF APPEALS SANCTIONED AN ERROR BY THE DISTRICT COURT IN FINDING THAT THIS CASE WAS NOT TIMELY BROUGHT

A. The Ninth Circuit's Decision Granting Summary Judgment on the Statute of Limitations Issue Was In Conflict With Its Own Decisions and the Decisions of Other Courts of Appeals

The district court erred in granting summary judgment to the defendants on the statute of limitations issue, and the Court of Appeals erred in affirming the district court orders, because prior decisions of both the Ninth Circuit and other Courts of Appeals have held that the accrual of the statute of limitations is an issue of fact – certainly not a matter to be ruled on at the outset of a case, before any discovery has been taken. In *Lundy v. Union Carbide Corp.*, 695 F.2d 394, 397 (9th Cir. 1982), *reh'g denied*, 765 F.2d 149 (9th Cir.), *cert. denied*, 474 U.S. 848 (1985), the Court of Appeals held that the "district court's grant of summary judgment based on the limitation ground was improper in view of the factual dispute as to whether [plaintiff] knew or should have known" by the statutory time period that he had a claim. Other courts have also denied summary judgment motions in similar

circumstances. In *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381 (10th Cir. 1985), the Court of Appeals for the Tenth Circuit held:

> While cases involving statute of limitations defenses frequently lend themselves to summary disposition, a court should not grant summary judgment for the defendant if there is a viable issue of fact as to when the limitations period began. It is settled law in the majority of circuits that the issue of when a plaintiff knew or with reasonable diligence should have known of a cause of action is a question of fact for the jury.

Id. at 1387 (emphasis added); *see also Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1042 (10th Cir. 1984) ("[t]he question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law"); *Williams v. Borden, Inc.*, 637 F.2d 731, 738 (10th Cir. 1981) (setting aside a summary judgment because a material issue existed as to whether plaintiff's claim should be equitably tolled); *Bradley v. Maryland Casualty Co.*, 563 F. Supp. 602, 607 (D. Del. 1983) (denying motion for summary judgment relating to claim of fraudulent concealment of facts).

Here, the granting of summary judgment was inappropriate at the very outset of the case because Amcor was certainly entitled to take discovery before any such motion should have been considered. Moreover, the case involved genuine issues of material fact as to, among other things, (1) whether the statute of limitations had been tolled based upon the conflicting legal precedent in

the Ninth Circuit, fraudulent concealment by defendants, duress by defendants, a continuing conspiracy by defendants with overt acts occurring within the statutory period, or Amcor's pursuit of alternate remedies; (2) when plaintiffs had notice of the specific facts asserted in the First Amended Complaint; and (3) whether the issues raised in the pleadings were the same issues discussed in the purported exhibits to the Robbins Declaration. A finding that even one of these issues existed would have required denial of the motions.

Plaintiffs did not know sufficient facts upon which to bring this action in good faith under Rule 11 of the Federal Rules of Civil Procedure until certain depositions were finally taken in another action in 1994. (Merriman Dec., Exc. 40, CR 40, pp. 6-16, ¶¶13, 16, 18-21, 23). It is irrelevant when or whether plaintiffs knew sufficient facts at some prior time on which to base some other potential action. Defendants obviously disputed the state and extent of plaintiffs' knowledge of the facts prior to 1994. However, in granting summary judgment, the district court must necessarily have made factual findings as to the state of and extent of plaintiffs' knowledge, thus resolving disputed factual issues. This invaded the province of the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Consequently, the lower courts erred in granting, and affirming the granting, of summary judgment.

B. The Lower Courts Ignored Evidence of A Continuing Conspiracy Involving One or More Overt Acts Within the Statutory Period

The First Amended Complaint asserted that defendants were engaged in a continuing conspiracy. In *Eichman v. Fotomat Corporation*, 880 F.2d 149 (9th Cir. 1989), the Court of Appeals summarized the law in the Ninth Circuit on the accrual of the statute of limitations in a continuing conspiracy case as follows: "When a plaintiff alleges a continuing violation of the law, an overt act is required to restart the statute of limitations and the statute of limitations runs from the last overt act." *Id.* at 160. Similarly, in *Pace Industries, Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987), the Court of Appeals stated: "Even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act."

An overt act must meet two criteria in order to restart the statute: first, it must be a new and independent act, not merely a reaffirmation of a previous act; second, it must inflict new and accumulating injury on the plaintiff. *Pace Industries, supra*, 813 F.2d at 237. Clearly there would be nothing to "accumulate" if damage arising from overt acts within the statutory period could not be combined with damage arising from earlier acts. *See Compton v. Ide*, 732 F.2d 1429, 1432 (9th Cir. 1984) ("Mere continuance of a conspiracy beyond the date when injury or damage occurs does not extend the statute of limitations. . . . To establish a continuing violation, continued unlawful acts must be demonstrated").

Here, overt acts pursuant to the conspiracy continued into the statutory period. Assuming for purposes of argument only that a one-year statute of limitations applies (which plaintiffs dispute; see section II below), any overt acts on or after October 12, 1993 would have been within the statutory period since the Complaint was filed on October 12, 1994. The First Amended Complaint and the declarations assert that even in 1994, well within the statute, defendants were still committing new constitutional violations against plaintiffs. See, e.g., Behrens Decl., ¶28, which establishes that in the summer of 1994 the IRS opposed the taking of additional depositions in the related litigation. (Exc. 42, CR 42, p. 9, ¶28.) This was an independent act causing new damage to plaintiffs, as it interfered with their right to Fifth Amendment due process of law.

Moreover, in 1992, Amcor had begun petitioning Congress to investigate its suspicions and, if the suspicions proved correct, to pass a Private or Special Act. (Exc. 42, CR 42, pp. 7-8 ¶¶20, 22.) The Behrens Decl. establishes that defendant Gayle Morin, Assistant to the Commissioner of the IRS pursuant to the conspiracy, sent letters to Senators and other Congressmen as late as October 20, 1993 stating that the IRS had determined that the allegations concerning government misconduct were unfounded. In fact, no such determination had occurred, but Ms. Morin's action prevented the passage of a Private or Special Act. (Exc. 40, CR 40, pp. 10-13, ¶¶27, 32; Exc. 42, CR 42, pp. 8-9, ¶¶24-26.) This overt act during the statutory period constituted an interference with plaintiffs' right to petition for redress of their grievances

through Congressional action, and was a new and independent act which violated plaintiffs' constitutional rights and which inflicted new and accumulating injury on plaintiffs.

In summary, this action should have been deemed timely even under a one-year statute of limitations, or at the very least, the matter of the accrual of the statute of limitations should have been reserved for the jury. The lower courts misapplied the law as to continuing conspiracies and should not have taken the draconian step of depriving plaintiffs of their day in court.

II. IF THE STATUTE OF LIMITATIONS HAD INDEED RUN, THE LOWER COURTS ERRED IN FAILING TO TOLL THE STATUTE OF LIMITATIONS BECAUSE OF AN UNRESOLVED CONFLICT IN NINTH CIRCUIT LAW

There is a conflict in the law of the Ninth Circuit as to the appropriate statute of limitations on *Bivens* claims. Specifically, while there is no dispute that a federal court should look to state law to determine the statute of limitations in such cases, there are two separate, distinct and conflicting lines of cases as to what constitutes the appropriate statute of limitations under state law: the personal injury statute (which in California is one year) or the general "catch-all" statute (which in California is four years). *Compare Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991), *McDougal v. County of Imperial*, 942 F.2d 668, 674 (9th Cir. 1991), and *Matthews v. Macanas*, 990 F.2d 467, 469 (9th Cir. 1993) (all of which apply the personal injury statute), *with Gerritsen v. Consultado General de Mexico*, 989

F.2d 340, 343 (9th Cir.), *cert. denied*, 114 S. Ct. 95 (1993); *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987); and *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980) (all of which apply the general "catch-all" statute). In light of this express and very obvious conflict, equitable principles dictate that the statute of limitations should have been tolled (i.e., extended to the longer of the two periods) because of the uncertainty caused by the conflicting rulings. *See, e.g., Satterfield v. Garmire*, 65 Cal. 2d 638, 645, 55 Cal. Rptr. 102, 107 (1967) ("Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention").

Here, the district court stated that it could "only surmise that [cases applying the one-year statute] were not provided to the court in *Gerritsen*." (Exc. 49, CR 49, p. 11, lines 17-18.) However, this is by definition mere speculation. *Gerritsen* is one of the most recent pronouncements by the Court of Appeals on the statute of limitations issue in *Bivens* cases.[3] Moreover, the earlier case of *Marshall v. Kleppe, supra*, which held that the four-year statute applied, has never been overruled. Indeed, the year **after** *Van Strum* was decided, in *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992), the Court of Appeals stated:

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[3] *Gerritsen*, which held that the statute of limitations was four years, was submitted March 3, 1993 and decided March 30, 1993. *Matthews v. Macanas*, 990 F.2d 467 (9th Cir. 1993), which, in contrast, held that the statute of limitations is one year, was decided the very next day.

> The district court found that the statute of limitations for a *Bivens* claim originating in California is one year. The court's finding appears contrary to the rule established by our holding in *Marshall v. Kleppe* [citation omitted]; *see Van Strum v. Lawn* [citation omitted] (holding that the statute of limitations applicable to *Bivens* claims is the state statute of limitations for personal injury, but declining to give that holding retroactive effect).

Id. at 869 n. 6.

In this case, the difference between the two statutes of limitations is very significant, as the First Amended Complaint clearly alleges conspiratorial acts which took place within four years of the date of filing of the original Complaint. (Exc. 3, CR 3, pp. 22-26, ¶¶41-47.) The district court did not dispute this fact. (Exc. 49, CR 49, p. 22, lines 5-10.) The district court acknowledged that the decisions of the Ninth Circuit were in conflict but nevertheless chose to apply the shorter of the two statutes of limitations, thereby finding the action to be untimely. The district court could just as easily have chosen the other statute of limitations. Respectfully, this was an abuse of discretion which should not have been condoned by the Ninth Circuit, and which now requires this Court to exercise its supervisory powers. At the very least, given the direct conflict in the law, the statute of limitations should have been equitably tolled to give plaintiffs the benefit of the longer statute of limitations, so as to permit this action to be decided on its merits.

III. IF THE STATUTE OF LIMITATIONS HAD INDEED RUN, THE LOWER COURTS ERRED IN FAILING TO TOLL THE STATUTE BASED ON DEFENDANTS' FRAUDULENT CONCEALMENT OF THE FACTS

This Court has held that the statute of limitations should be equitably tolled when the opposing party has fraudulently concealed the full extent of its wrongdoing from the plaintiff. *Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 22 L. Ed. 636 (1874); *see also Hobson v. Wilson,* 737 F.2d 1, 33, 36-37 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985), one of the leading cases on fraudulent concealment. The law in the Ninth Circuit is similar to *Hobson* if not identical. *E.g., Rutledge v. Boston Woven Hose & Rubber Co.,* 576 F.2d 248 (9th Cir. 1978); *Stitt v. Williams,* 919 F.2d 516, 523 (9th Cir. 1990); *N.L.R.B. v. Don Burgess Construction Corp.,* 596 F.2d 378, 382 (9th Cir.), *cert. denied,* 444 U.S. 940 (1979).

California law is also similar. *See Stalberg v. Western Title Ins. Co.,* 27 Cal. App. 4th 925, 931, 32 Cal. Rptr. 2d 750 (1994) ("one cannot justify or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations"); *Ateeq v. Najor,* 15 Cal. App. 4th 1351, 1356, 19 Cal. Rptr. 2d 320 (1993) ("A defendant should not be permitted to . . . plead in defense the delay occasioned by his own conduct").

In *Hobson,* the D.C. Circuit held that in order for the plaintiff to be on "notice" of facts sufficient to start the statute of limitations running, plaintiff must have:

> an awareness of sufficient facts to identify a particular cause of action . . . We do not mean the kind of notice – based on hints, suspicions, hunches, or rumors – that requires a plaintiff to make inquiries in the exercise of due diligence, but not to file suit.

737 F.2d at 35. The D.C. Circuit also held that the statute of limitations does not begin to run, or must be tolled, until a plaintiff is aware of the persons responsible for his, her or its injuries:

> [P]laintiff's knowledge of the grounds for a suit must generally extend to an awareness of the persons responsible for plaintiff's injury. We by no means imply that a plaintiff may postpone suit until he knows every defendant by name and title. However, simply because a person knows he has been injured by one person cannot reasonably mean he should be held to know of every other participant. This Circuit's decision in *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977), illustrates the point. . . . We therefore must probe a plaintiff's knowledge to determine whether he was on notice of all possible defendants, and not just a subgroup, as well as the particular cause of action.

Id. at 36.

Here, the district court found (and the Ninth Circuit implicitly affirmed) that no fraudulent concealment had occurred because plaintiffs allegedly knew the facts of which they complained several years before the Complaint was filed. (App. 13, 34.) However, the lower courts erred in making such a determination. Defendants' conspiracy sought not only to deprive plaintiffs of their constitutional rights but to prevent them from learning of

what had occurred. This conspiracy continued, at the very least, well into 1994.

The First Amended Complaint and the declarations are replete with facts establishing that prior to 1994, when depositions were finally taken and documents produced in a related case, plaintiffs did not know and could not have known (1) whether they in fact had valid claims for relief and the legal theories underlying such claims, and (2) the names of the people against whom plaintiffs had valid claims for relief. See, for instance:

(a) the First Amended Complaint, Exc. 3, CR 3, p. 4, lines 7-8; p. 7, lines 10-12; p. 7, lines 15-26; p. 10, lines 6-8, lines 17-21; p. 10, line 27-p. 11, line 2; p. 11, lines 12-14, lines 22-27; p. 12, lines 6-8; p. 13, lines 15-17, lines 23-24; p. 14, lines 17-21; p. 14, line 27-p. 15, line 3; p. 15, lines 15-17; p. 15, line 26-p. 16, line 1; p. 21, line 22-p. 22, line 2; p. 22, lines 17-24; p. 23, lines 3-11, lines 22-25; p. 24, lines 4-7; p. 25, line 22-p. 26, line 1;

(b) the Merriman Declaration, Exc. 40, CR 40, p. 2, ¶3, lines 14-20; p. 3, ¶6, line 17-p. 4, line 2; p. 5, ¶10, lines 4-18; p. 6, ¶13-p. 15, ¶31; p. 15, ¶33, line 27-p. 16, line 7; and

(c) the Behrens Declaration, Exc. 42, CR 42, p. 5, ¶14, lines 7-9; p. 9, ¶25, lines 3-7.

Indeed, as to the Merriman Declaration, which sets forth at length what was learned in each 1994 deposition (Exc. 40, CR 40, pp. 6-16, ¶¶13, 16, 18-21, 23), each and every assertion contained therein creates a material issue of fact which should have been sufficient to warrant denial of defendants' motions.

Prior to the 1994 depositions, as the declarations clearly show, defendants hindered at every turn any potential investigation of the facts by plaintiffs, by, among other things, fomenting litigation, lying to Congress, interfering with witnesses, committing perjury, destroying and hiding documents, lying to other agency officials, lying to the Tax Court (where the related litigation was pending), and making material misrepresentations to then-Magistrate Judge (now Judge) George H. King, who issued a search warrant for Amcor's books and records based on these misrepresentations. (*See generally* Exc. 3, CR 3; Exc. 40, CR 40; Exc. 42, CR 42.) While plaintiffs may have had hunches, speculation and suspicions prior to 1994 about what had occurred, as reflected in the documents attached to the Robbins Declaration, they had no practical means to do further due diligence at that time because they believed they were under criminal investigation. Indeed, a grand jury was pending until April 993 (though no criminal charges were ever filed). The law is clear that mere hunches or suspicions are not sufficient to trigger the statute of limitations.

More importantly, plaintiffs' hunches, speculation and suspicions as expressed in the exhibits to the Robbins Declaration did not form the basis for the current lawsuit, and, indeed, proved to be wrong in numerous instances. As the Merriman Declaration establishes, if plaintiffs had sued on the basis of those erroneous hunches and suspicions at any time before they had the facts obtained through the 1994 discovery, they could well have exposed themselves to claims of malicious prosecution. (Exc. 40, CR 40, ¶¶5-9.) They certainly did not have sufficient facts to satisfy the requirements of Rule 11 of the Federal Rules

of Civil Procedure. It cannot be the policy of the law to force plaintiffs to choose between complying with Rule 11 on the one hand and possibly losing their claim altogether under the statute of limitations on the other. Accordingly, the lower courts should have held that the statute of limitations did not accrue or was equitably tolled because of defendants' fraudulent concealment, or, alternatively, under the *Lundy* and *Hobson* cases, *supra*, the issue of tolling should have been reserved for the jury.

IV. IF THE STATUTE OF LIMITATIONS HAD INDEED RUN, THE LOWER COURTS ERRED IN FAILING TO TOLL THE STATUTE BASED ON PLAINTIFFS' PURSUIT OF ALTERNATE REMEDIES

In *Hinton v. Pacific Enterprises*, 5 F.3d 391 (9th Cir. 1993), *cert. denied*, 511 U.S. 1083 (1994), the Ninth Circuit held that "equity will toll the statute of limitations while a plaintiff, who possesses different legal remedies for the same harm, reasonably and in good faith pursues one. . . . " *Id.* at 396 (quoting *Aerojet General Corp. v. Superior Court*, 177 Cal. App. 3d 950, 223 Cal. Rptr. 249 (1986)). The Ninth Circuit has also held that the exhaustion of administrative remedies may toll the statute of limitations or prevent it from running. *Fobbs v. Holy Cross Health System Corporation*, 29 F.3d 1439, 1445 (9th Cir. 1994), *cert. denied*, ___ U. S. ___, 115 S. Ct. 936 (1995); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980) (statute of limitations may be equitably tolled while an administrative agency decides issues within its primary jurisdiction). California law is similar if not identical. *Stalberg, supra*, 27

Cal. App. 4th at 932 ("[a] plaintiff will be relieved 'from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage' " (*quoting Addison v. State*, 21 Cal. 3d 313, 320-21 (1978)); *Garabedian v. Skochko*, 232 Cal. App. 3d 836, 841 (1991) ("[t]he 'Several Remedies' Rule has been recognized as a separate ground for tolling the limitations period" regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another).

Here, the limitations period was or should have been tolled because at least two different remedies in addition to the instant action were being pursued simultaneously:

1. Plaintiffs have been engaged for years in administrative proceedings before the IRS involving the same matters at issue in this lawsuit, including among other things the issuance of the "thirty-day letters" followed by litigation in the Tax Court, which was the lawsuit in which the 1994 depositions were conducted. During this period of time Amcor was attempting to reach a settlement of the dispute (Exc. 40, CR 40, pp. 5-16, ¶¶11-34);

2. Beginning in 1992, Amcor sought redress from Congress with a view toward eventually obtaining a Private or Special Act (Exc. 42, CR 42, pp. 7-8, ¶¶20, 22).

The Tax Court litigation involves the same issues as those involved here – i.e., whether the United States and certain of its employees wrongfully sought to destroy Amcor and its limited partners, without justification and in violation of law. In the Tax Court case, the United States sought to accomplish that goal by disallowing the

deductions to which the taxpayers should have been entitled based on their limited partnership status in the Amcor partnerships. The Tax Court litigation indisputably put defendants on notice that the instant action might be brought. Accordingly, at the very least, the statute of limitations should have been tolled since 1990, when the Tax Court litigation was filed. (Exc. 3, CR 3, pp. 24-26, ¶¶46-47.)

V. BECAUSE THE SAME TOLLING PROVISIONS APPLICABLE TO STATE PEACE OFFICERS SHOULD ALSO BE HELD TO APPLY TO FEDERAL INVESTIGATORS BEING SUED IN *BIVENS* ACTIONS, THE LOWER COURTS ERRED IN FAILING TO TOLL THE STATUTE OF LIMITATIONS BASED ON THE FACT THAT A CRIMINAL INVESTIGATION WAS PENDING AGAINST PLAINTIFF AMCOR

In *Matthews v. Macanas*, 990 F.2d 467, 469 (9th Cir. 1993), the Ninth Circuit held that suits against federal criminal investigators and law enforcement officers were not subject to the same tolling provisions applicable to suits against California peace officers. Because there is no logical reason to discriminate between the two sets of law enforcement officials, the same tolling principles should apply to both of them, and this Court should exercise its supervisory powers to require a re-examination of the *Matthews* holding in light of the facts of the instant case. The lower courts do not appear to have reached this issue, although it was fully briefed below.

In *Matthews*, plaintiff's *Bivens* action was dismissed as untimely because the court held that the applicable

statute of limitations was one year and the case had been filed after the year expired. Plaintiff contended nevertheless that his action was timely filed in light of California's tolling statute, California Government Code section 945.3, which provides in pertinent part:

> No person charged by indictment, information, complaint or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, . . . while the charges against the accused are pending before a . . . court.
>
> Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a . . . court.

Despite the unequivocal provisions of this statute, the court responded that under California law, specifically Penal Code section 830.8(a), "[f]ederal criminal investigators and law enforcement officers are not California peace officers." *Matthews, supra,* 990 F.2d at 469. Section 830.8(a) provides in pertinent part:

> Federal criminal investigators and law enforcement officers are not California peace officers, but may exercise the powers of arrest of a peace officer in any of the following circumstances:
>
> . . . .
>
> (2) When these investigators and law enforcement officers are engaged in the enforcement of federal criminal laws . . .

Based upon this rationale, the dismissal of the actions on statute of limitations grounds was upheld.

The court's attempt to limit Government Code section 945.3 by engrafting upon it Penal Code section 830.8(a) was, respectfully, erroneous. Penal Code section 830.8(a) has nothing to do with the tolling of statutes of limitations. Section 830.8(a) was enacted in 1980 as part of a broader statutory scheme designed only for a limited purpose. As the legislative history (as reflected in the Historical and Statutory Notes of the California Legislature) states: "It is the intent of the Legislature that the changes effected by this act shall serve only to define peace officers, the extent of their jurisdiction, and the nature and scope of their authority, powers, and duties . . . " The legislative history thus expressly disclaims any intention to affect broader policy concerns such as that which is at issue in the instant case.

Indisputably the courts have increasingly tended to apply the same legal standards and principles to cases brought under *Bivens* as they have to federal civil rights cases. In *Van Strum, supra,* the Court of Appeals stated:

> Actions under [42 U.S.C.] section 1983 and those under *Bivens* are identical save for the replacement of a state actor under section 1983 by a federal actor under *Bivens.*

940 F.2d at 409. In *Harding v. Galceran,* 889 F.2d 906, 908 (9th Cir. 1989), *cert. denied,* 498 U.S. 1082 (1991), the Ninth Circuit extended Government Code section 945.3 to federal civil rights actions alleging violations of 42 U.S.C. section 1983. Thus, the Ninth Circuit has already recognized in the statute of limitations context that *Bivens*

actions and section 1983 actions should be treated identically. The same principle should apply with respect to the tolling of the statute of limitations.

While section 945.3 does not expressly refer to criminal investigations (as opposed to an indictment or complaint), the rationale underlying the statute is equally applicable to grand jury investigations. Here, a grand jury investigation was pending until April 1993. While such an investigation was pending, the statute of limitations should have been tolled. Settlement efforts to foreclose an indictment are the essence of the grand jury process, and a plaintiff should not be forced to file an action while such efforts are ongoing on pain of losing the right to file such a lawsuit later on.

VI. THE LOWER COURTS ERRED IN HOLDING THAT PLAINTIFFS' CLAIM FOR UNLAWFUL DISCLOSURE OF TAX RETURN AND FINANCIAL INFORMATION WAS BARRED BY THE STATUTE OF LIMITATIONS

The Fourth Claim for Relief was brought against the United States under 26 U.S.C. sections 6103, 7430 and 7431 for unlawful disclosure to third parties of tax return and other financial information relating to plaintiffs. The district court found that the United States was not added as a party to the action until the filing of the First Amended Complaint on January 5, 1995 and that, while a two-year statute of limitations applied pursuant to section 7431(d), "Amcor knew of the core facts which make up its allegations against the Government before January

3, 1993." (App. 13.) Accordingly, the court granted summary judgment on this claim, like the *Bivens* claims, on the ground that the statute of limitations had expired.

The unlawful disclosures which are the subject of this claim occurred on at least two occasions. First, in or about 1989 the civil section of the IRS sent so-called "thirty-day" letters to six Amcor partnerships which contained confidential information. Ultimately this information was disclosed to about one thousand people. (Exc. 42, CR 42, ¶4.) Second, in or about 1989, 1990 and 1991, the IRS Criminal Investigation Division sent letters to the Agricultural Stabilization and Conservation Service ("ASCS") in Texas, some of which referenced Amcor general partners by name. (Exc. 40, CR 40, ¶31.)

The thirty-day letters were withdrawn in 1989, but plaintiffs did not discover until 1994, during the discovery in the related litigation, that the letters had been issued for improper purposes. (Exc. 40, CR 40, ¶19.) Thus, the statute of limitations should have been tolled for fraudulent concealment of the facts making the issuance and withdrawal of the letters unlawful from the outset. *See Hobson v. Wilson, supra.* Similarly, with respect to the disclosures to the ASCS, plaintiffs again did not discover and, until a deposition was taken in the related litigation, could not have discovered until 1994 that the wrongful disclosures had taken place. (Exc. 40, CR 40, ¶¶17-21, 23-24, 26, 30, 31; Exc. 3, CR 3, pp. 22-23, ¶41.)

Nothing in the alleged evidence cited by the district court references the specific unlawful acts discussed in this section; on the contrary, any references to alleged unlawful disclosures were different suspected offenses

from the offenses ultimately sued upon. The lower courts erred in rushing to dismiss this claim without a sound basis for doing so and without allowing any discovery.

VII. CONCLUSION

Plaintiffs have never had a hearing on the merits in this case. It is time that they were permitted to pursue their claims, at least to the extent of permitting discovery on the statute of limitations issue and permitting a jury to decide this issue. For all of the reasons stated herein, petitioners respectfully request that the Court grant this petition.

Respectfully submitted,

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Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMCOR CAPITAL CORPORATION, a Delaware corporation; FRED H. BEHRENS, individually and as General Partner for certain listed AMCOR Limited Partnerships; ROBERT A. WRIGHT, individually and as General Partner for certain limited AMCOR Limited Partnerships, Plaintiffs-Appellants, v. WILBUR GOOLKASIAN; PHILLIP LARSON; JAMES LAURENCE; MILES D. FRIEDMAN; JOE MUDD; HARRY M. ASCH; WILLIAM K. SHIPLEY; GEORGE MARTIN; VINCENT CAPOBIANCO; BOBBY JACK TADLOCK; TOM PHILLIPS; ALLEN SILVERMAN; LYNDA WINTER; MICHAEL RICKUS; DOUGLAS WATSON; PETE TAGNI; WAYNE McEWAN; GAYLE MORIN; JESSE COTA; ROBERT NIED; NAOMI COY; UNITED STATES OF AMERICA, Defendants-Appellees.	No. 95-56079 D.C. No. CV-94-06814-DT ORDER (Filed Jan. 15, 1997)

Appeal from the United States District Court for the Central District of California, Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted December 11, 1996
Pasadena, California

Before: **HALL, KOZINSKI** and **HAWKINS** Circuit Judges.

The judgment of the district court is AFFIRMED substantially for the reasons stated in that court's orders.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMCOR CAPITAL CORPORATION, a Delaware corporation, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, WILBUR GOOLKASIAN, INC., Defendants.	CASE NO. CV 94-6814 DT (GHKx) ORDER **GRANTING** DEFENDANT THE UNITED STATES OF AMERICA'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AS TO THE FIRST, SECOND AND THIRD CLAIMS FOR RELIEF AND **GRANTING** MOTION FOR SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(c). (Filed June 12, 1995)

Background

1. Factual Summary.

This action is brought by plaintiff Amcor Capital Corporation, two of its principals Fred H. Behrens and Robert A. Wright, and Amcor Limited Partnerships (collectively "Amcor") against defendant the United States of America ("Government") and twenty-one present and former officials of the Internal Revenue Service ("IRS"), the Department of Justice and the Office of the Chief Counsel of the IRS (collectively "Defendants") for allegedly acting under color of federal authority in the wrongful investigation and prosecution of Amcor for alleged tax violations.

2. **Procedural History.**

On October 12, 1994, Amcor filed its Complaint for violation of Constitutional rights under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) ("*Bivens* claim"). On January 3, 1995, Amcor filed the First Amended Complaint for violation of constitutional rights, conspiracy to violate civil rights, unlawful disclosure of tax return information and invasion of privacy and adding as defendants Naomi Coy and the Government. Defendants Vincent Capobianco, Jesse Cota, Phillip Larson, George Martin, Gayle Morin, Joe Mudd, Tom Phillips, William K. Shipley, Allen Silverman, Bobby Jack Tadlock, Douglas Watson, Lynda Winter (collectively "Individual Defendants") were served with the First Amended Complaint on March 14, 1994.

On March 13, 1995, the Government filed the Motion To Dismiss The First Amended Complaint which is presently before this Court. On April 7, 1995, the Individual Defendants filed twenty-one separate Motions to Dismiss The First Amended Complaint, Or In The Alternative For Summary Judgment which are presently before this Court.

Some of the defenses to the First Amended Complaint set forth in these motions are identical. These defenses include the statute of limitations and the preclusion of Bivens damages remedy due to special factors and/or alternative remedies. In addition, however, some of the defendants seek dismissal based upon Amcor's alleged failure to serve them with the complaint within 120 days of filing the complaint. Finally, some of the factual contentions against the Individual Defendants

varies based upon their involvement in the alleged conspiracy. As a result of these differences, two separate orders have been prepared.

Discussion

1. Standard.

A. Motion To Dismiss.

In considering a motion a dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must assume that the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981) Moreover, even if the fate of the pleadings indicates that recovery is unlikely, the plaintiff is still entitled to offer evidence in support of the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Redwood City*, 640 F.2d at 967. Finally, the court may not dismiss complaints pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Russel v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). Where the parties must rely upon extrinsic evidence to resolve an issue originally brought on a motion to dismiss, this Court may convert the motion to a motion for summary judgment. Rule 12(b) of the Federal Rules of Civil Procedure.

B. Motion For Summary Judgment.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. Federal Rules Civil Procedure, Rule 56(e).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *Anderson*, 77 U.S. at 250-51. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989); *California Building Products, Inc v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988).

2. Dismissal Of Amcor's First, Second, And Third Claims For Relief Is Warranted.

The Government contends that Amcor's First, Second and Third Claims for Relief should be dismissed because Amcor cannot sue the Government on a *Bivens* claim. *FDIC v. Meyer*, ___ U.S. ___, 114 S.Ct. 996, ___ (1994). Amcor admits that it never intended to name the Government in its First, Second and Third Causes of Action and acknowledges that the Government cannot be sued as a defendant on a *Bivens* claim. Therefore, this Court **grants** the Government's Motion to Dismiss the First, Second and Third Causes of Action **with prejudice** and **without leave to amend** as to the Government.

3. The Fourth Cause of Action Is Time-Barred.

26 U.S.C. § 7431(d) provides a two-year statute of limitations in which claims for unauthorized disclosure of tax return information must be brought against the Government. This statute of limitations begins to run from the date upon which the plaintiff knows or should have known of the subject injury. *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439, 1444 (9th Cir. 1994); *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991); *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986); *Cline v. Brussett*, 661 F.2d 108, 110 (9th Cir. 1981). The continuing violation doctrine does not necessarily toll the statute where the plaintiff experiences continuing impact from past violations. *McDougal v. County of Imperial*, 942 F.2d 668, 674-675 (9th Cir. 1991). Instead, it is the last overt act upon which the claim is based that

dictates the commencement of the statute of limitations. *Gibson v. United States*, 781 F.2d 1334, 1340 (9th Cir. 1986).

The Government contends that because Amcor has failed to allege that it discovered the unauthorized disclosure after January 5, 1993, that its Fourth Cause of Action is time-barred under the two-year statute of limitations. The Government further alleges that Amcor was well aware of the alleged unauthorized disclosures and misconduct by the Government and its co-defendants long before 1994 as Amcor suggests. This Court agrees. Although Amcor alleges throughout its First Amended Complaint that it did not discover the unauthorized disclosure until 1994, Amcor's own letters and internal memoranda indicate otherwise. *See* December 19, 1991 Letter from Roger M. Olsen, Esq. to Steven Murphy, Esq. attached as Exhibit "2" to the Declaration of Edward M. Robbins, Jr.; June 17, 1992 Internal Memorandum to Amcor Shareholders And Limited Partners In American Agri-Corp Sponsored Partnerships attached as Exhibit "3" to the Robbins Decl.; March 16, 1993 Letter from Barry Goverman of Amcor Capital Inc. to the Honorable Larry A. Compest, United States House of Representatives, attached as Exhibit "4" to the Robbins Decl. The 25-page December 19, 1991 Letter specifically states:

> "I will not list or outline for you all the various violations, for they are voluminous. However, in this criminal investigation, the pervasive violations of federal criminal statutes by federal investigators are material . . . I am not addressing merely a few isolated events, but a pervasive, and willful circumvention and disregard of legal principles and Federal statutes by both the

Justice Department and the IRS. There are a number of legal impediments that the Tax Division must now address:

1. A total and complete emasculation of the taxpayer privacy rules under Internal Revenue Code (Code) § 6103 and the referral provisions of Code § 7602(c)(2) by sharing a civil tax audit with a U.S. Attorney's Office to obtain immunity for a recalcitrant witness in that audit.

2. Violating the same statutes by illegally conducting administrative civil tax audits and criminal tax investigations with the Department of Agriculture and apparently sharing information about same.

3. The violation of the Fifth and Sixth Amendments by the corruption of the attorney client privilege and relationship by retaining as an undercover paid informant the services of the lawyer for an immunized witness.

4. The violation of the Fifth and Sixth Amendments by the illegal use of an attorney who, operating as a paid informant, attempted to and successfully did violate the attorney client privilege of Behrens and others.

5. The violation of the Fifth and Sixth Amendments by the illegal and intentional intrusion and violation of the attorney client privilege by the same informant who communicated directly with the outside counsel *after* the March 1989 search warrant was executed.

And there are more . . .

5/ There is another violation by C.I.D., using an attorney for witness as a paid IRS informant in violation of IRS Guidelines.

7/ Based on the quantum of evidence establishing that Goolkasian and others in the IRS violated so many law enforcement internal guidelines, federal statutes and constitutional privileges, I question whether the statements attributed to Ted Frame in the Goolkasian affidavit to the search warrant are accurate or whether they are willfully misleading, and thus false, permitting the Court to exclude all of the evidence seized. The affidavit to the search warrant in this investigation, executed by Wilbur Goolkasian on March 14, 1989, ("Affidavit") and the testimony of Wendell Davies in his oral deposition . . . provides clear and uncontroverted evidence that all of the fruits of this entire investigation were tainted from the beginning an [sic] that both the Department of Justice and the Internal Revenue Service have willfully and deliberately conducted an investigation without regard to federal law . . .

The referral to the Justice Department resulted in the IRS and A.U.S.A. committing a felony, a violation of § 7213 of the Code. The investigation absolutely failed to satisfy the requirements of §§ 6103(h)(2) or 6103(i) of the Code . . .

In July 1989 the IRS issued the Tax Matters Partner ("TMP") of five AMCOR-related partnerships proposing civil tax adjustments. The TMP was required by the IRS to send a copy of each such notice to every investor, so there is no question about the level of review by the IRS of these notices . . . There is no known express

statutory authority for the IRS to conduct a joint investigation with the Department of Agriculture, without simultaneously violating Code §§ 6103 and 7213. Formal discovery will ascertain the exact violation here . . .

From the fruits of that illegal process, Special Agent Martin provided information to Goolkasian. Running rough shod over federal law enforcement procedures and statutes, neither Special Agent Martin nor Laurence ever bothered to consider whether or not either had proper authority to conduct a civil tax audit or criminal investigation in this fashion. No A.U.S.A., Laurence included, had any authority whatsoever, to grant immunity to anyone in connection with an IRS administrative audit or investigation, yet that is exactly what happened.

The immunity having been secured in direct violation of §§ 6103 and 7602(c) of the Code, the agents and Laurence thereby committed a felony in violation under Code § 7213, as well as 18 U.S.C. Section 371, by a wilful violation of a known legal duty, thereby impairing the IRS in the lawful audit function. *12/*

12/ There are other violations as well. *See United States v. Twell,* 550 F.2d 297 (5th Cir. 1977) since the IRS actually attempted to mislead the taxpayers into thinking that Davies, ostensibly as co-counsel, was assisting in legally representing a third person in a civil tax audit, when in fact it was a criminal investigation . . .

What Goolkasian does not expressly state is whether or not he had direct contact with A.U.S.A. Laurence in this investigation. Wendall Davies testified that Goolkasian did discuss this case with A.U.S.A. Laurence, and like Special

> Agent Martin, it is doubtful that they discussed ode [sic] § 6103. Naturally we assume that the government is prepared to answer that question for again it would involve ascertaining whether or not the Internal Revenue Service again conducted an investigation concurrently with a prosecutor in the Department of Justice, in direct violation of every known requirement for a special agent, the Internal Revenue Service, and the Department of Justice.
>
> Violating federal statutes, ignoring internal departmental guidelines, disregarding statutorily protected privileges, desecrating at least the Fifth and Sixth Amendments to the U.S. Constitution, the government would do well to consider disciplinary action, and perhaps more of its own governmental agents, rather than seeking to cleanse itself with an indictment that will become misconduct."

The July 8, 1992 Memorandum is also attached as Exhibit 2 to the Robbins Decl. Further, the June 17, 1992 Memorandum sets forth the impropriety of the thirty-day letters, the fraud contained in those letters, "*pattern* of blatant Government misconduct directed at AMCOR and its investors", the Government's involvement with the Department of Agriculture and the Government cover-up of the misconduct. This June 17, 1992 Memorandum also indicates Amcor's intention to expose the governmental wrongdoing and seek redress. In a July 8, 1992 Memorandum entitled "The Amcor Conspiracy 'Rogue Gallery' of Players", Amcor lists the various key players in the alleged government conspiracy, including Vince Capobianco, Wilbur Goolkasian and Bobby Jack Tadlock.

Because this Court relies upon evidence extrinsic to the Complaint in arriving at its decision herein, the present motion regarding the Fourth Cause of Action for unauthorized disclosure will be treated as one for summary judgment pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure. The original Complaint was filed on October 12, 1994. However, the Government was not named as a party until the filing of the First Amended Complaint on January 5, 1995. Therefore, the Fourth Cause of Action is barred by the two-year statute of limitations because Amcor's own letters and internal memoranda indicate that Amcor knew of the core facts which make up its allegations against the Government before January 3, 1993 and this Court grants the Government's Motion For Summary Judgment on the Fourth Cause of Action.[1]

IT IS SO ORDERED.

DATED: Jun. 12, 1995

/s/ Dickran Tevrizian
Dickran Tevrizian, Judge
United States
District Court

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[1] Based upon the foregoing ruling, this Court does not reach the sufficiency or insufficiency of the pleading of the Fourth Cause of Action.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMCOR CAPITAL CORPORATION, a Delaware corporation, et al.; FRED H. BEHRENS, individually, and as General Partner for certain AMCOR Limited Partnerships, ROBERT A. WRIGHT, individually, and as General Partner for certain AMCOR Limited Partnerships, Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants.	CASE NO. CV 94-6814 DT (GHKx) ORDER **GRANTING** DEFENDANTS HARRY M. ASCH, VINCENT CAPOBIANCO, JESSE COTA, NAOMI COY, MILES D. FRIEDMAN, WILBUR GOOLKASIAN, PHILLIP LARSON, JAMES LAURENCE, GEORGE MARTIN, WAYNE MCEWAN, GAYLE MORIN, JOE MUDD, ROBERT NIED, BOBBY JACK TADLOCK, TOM PHILLIPS, MICHAEL RICKUS, WILLIAM K. SHIPLEY, ALLEN SILVERMAN, PETE TAGNI, DOUGLAS WATSON, AND LYNDA WINTER'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56(c) AND **DENYING** MOTIONS TO DISMISS IN PART. (Filed Jun. 12, 1995)

Background

1. Factual Summary.

This action is brought by plaintiff Amcor Capital Corporation, two of its principals Fred H. Behrens and Robert A. Wright, and Amcor Limited Partnerships (collectively "Amcor") against the United States of America and twenty-one present and former officials of the Internal Revenue Service ("IRS"), the Department of Justice and the Office of the Chief Counsel of the IRS (collectively "Defendants") for allegedly acting under color of federal authority in the wrongful investigation and prosecution of Amcor for alleged tax violations.

2. Procedural History.

On October 12, 1994, Amcor filed the Complaint for violation of Constitutional rights under *Bivens v. Six Unknown Agents,* 403 U.S. 388 (1971) ("*Bivens* action"). On January 3, 1995, Amcor filed the First Amended Complaint for violation of constitutional rights (First Claim For Relief), conspiracy to violate civil rights (Second Claim For Relief), invasion of privacy (Third Claim For Relief), and unlawful disclosure of tax return information (Fourth Claim For Relief), and adding as defendants Naomi Coy and the United States of America. Defendants Vincent Capobianco, Jesse Cota, Phillip Larson, George Martin, Gayle Morin, Joe Mudd, Tom Phillips, William K. Shipley, Allen Silverman, Bobby Jack Tadlock Douglas Watson, Lynda Winter (collectively "Individual Defendants") were served with the First Amended Complaint on March 14, 1994 [sic].

On March 13, 1995, defendant United States of America ("United States") filed the Motion To Dismiss The First Amended Complaint which is presently before this Court. On April 7, 1995, the Individual Defendants filed twenty-one separate Motions to Dismiss The First Amended Complaint, Or In The Alternative For Summary Judgment which are presently before this Court.

Some of the defenses to the First Amended Complaint set forth in these motions are identical. These defenses include the statute of limitations and the preclusion of a *Bivens* damages remedy due to special factors and/or alternative remedies. In addition, some of the defendants also seek dismissal based upon Amcor's alleged failure to serve them with the complaint within 120 days of filing the complaint. Finally, some of the factual contentions against the Individual Defendants varies based upon their involvement in the alleged conspiracy. As a result of these differences, two separate orders have been prepared.

Discussion

1. Standard.

A. Motion To Dismiss.

In considering a motion a dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must assume that the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981) Moreover, even if the face of the pleadings indicates that recovery is unlikely, the plaintiff

is still entitled to offer evidence in support of the complaint. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Redwood City,* 640 F.2d at 967. Finally. the court may not dismiss complaints pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Russel v. Landrieu,* 621 F.2d 1037, 1039 (9th Cir. 1980). Where the parties must rely upon extrinsic evidence to resolve an issue originally brought on a motion to dismiss, this Court may convert the motion to a motion for summary judgment. Rule 12(b) of the Federal Rules of Civil Procedure.

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be subject to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *Anderson*, 77 U.S. [sic] at 250-51. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989); *California Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988).

2. Dismissal Of Certain Individual Defendants Based Upon A Violation of Rule 4(m) Is Not Warranted.

Defendants Capobianco, Cota, Larson, Martin, Morin, Mudd, Phillips, Shipley, Silverman, Tadlock, Watson, and Winter request an order of dismissal for Amcor's failure to serve them with the original Complaint within 120 days of the filing of the original Complaint. Rule 4(m) of the Federal Rules of Civil Procedure provides in pertinent part:

> "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure,

> the court shall extend the time for service for an appropriate period."

The Notes Of Advisory Committee On Rules, 1993 Amendment states:

> "The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown . . . A specific instance of good cause is set forth in paragraph (3) of this rule, which provides for extensions if necessary to correct oversights in compliance with the requirements of multiple service in actions against the United States or its officers, agencies, and corporations."

In this action, Amcor filed the original Complaint on October 12, 1994. On January 3, 1995, Amcor filed the First Amended Complaint. Defendants Capobianco, Cota, Larson, Martin, Morin, Mudd, Phillips, Shipley, Silverman, Tadlock, Watson and Winter were not served until March 14, 1995. Technically, under Rule 4(m), the last day upon which to serve these defendants in a timely fashion was February 9, 1995 and therefore these defendants were not timely served within the language of Rule 4(m). This Rule, however, is to be applied within the discretion of this Court and the plaintiff may be relieved of the harsh consequences of not meeting the letter of Rule 4(m) even if good cause is not shown. Here, Amcor filed an amended complaint within the 120 day period. It is understandable that Amcor would not serve the original Complaint after it decided to file an amended one and it

would have been a waste of time and effort to prepare numerous original Complaints for service after this decision was made. Therefore, this Court finds that dismissal of these defendants under Rule 4(m) is too harsh a penalty and **denies** these defendants, request for dismissal on this ground.

2. There Is No Conflict Of Laws Issue In This Action, California Law Applies.

Amcor contends that this Court must first make a determination of which state has the most interest in having its laws applied to this case because the laws of three different states apply to this action and additional discovery is needed to complete this analysis. As a result, Amcor requests this Court either deny the motions or grant Amcor a continuance of the hearing on these motions to allow Amcor to conduct discovery. This Court disagrees. Although this Court does not believe that a conflict of laws issues [sic] exists, this Court will briefly engage in an analysis of this issue.

Under California's approach to the conflicts of law issue, the state whose interest would be most impaired if its law were not applied is the state law which should be applied in the case if a true conflicts of law issue exists. *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1507 (9th Cir. 1993); *Engel v. CBS, Inc.*, 981 F.2d 1076, 1081 (9th Cir. 1992).

Amcor contends that one of the individual defendants and three corporate defendants reside in Texas and one of the Amcor corporations is located in the District of Columbia. Though contact with the forum, in and of

itself, is not the relevant inquiry required for determining the proper law to apply in a conflict of law analysis in California, the facts demonstrate that California's interests in this matter would be the most impaired if its laws were not applied.

This Court finds that Amcor's business premises were searched in California, the search warrant for that search was executed by a California Magistrate, a criminal investigation of an Amcor principal was initiated in California, and Amcor's property was seized in California. This Court finds that a determination of whether the California search warrant was properly obtained, and whether the search, the seizure of property the audit of Amcor and its partnerships initiated by the IRS in California and the criminal investigation in California were proper, should be made with the application of California's laws because California would have a greater interest in applying its laws to conduct occurring within its boundaries. There is no evidence indicating that either Texas nor the District of Columbia has a greater interest than California in these events.

Further, this Court also finds that the majority of the defendants reside in California, Amcor is a Delaware corporation with its principal place of business in California, of the ninety-eight Amcor partnerships, ninety-five are registered in California, three are registered in Texas, Mr. Behren resides in California, and Mr. Wright resides in Texas. This Court finds that the State of California has a recognizable interest in having its statute of limitations applied because this statute of limitations applies to the majority of the Individual Defendants and the action was

filed in California not in Texas or the District of Columbia. Therefore, this Court will apply the applicable California statute of limitations to this case.

3. This Action Is Barred By The California One-Year Statute Of Limitations As to All Individual Defendants.

Amcor's First, Second and Third Causes of action are *Bivens* claims. Amcor contends that its *Bivens* claims are subject to the four-year "catch-all" statute of limitations codified in California Code of Civil Procedure § 343. *Gerritsen v. Consultado General De Mexico*, 989 F.2d 340, 343 (9th Cir. 1993) (citing *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986). California Code of Civil Procedure § 343 provides:

> "ACTIONS FOR RELIEF NOT HEREINBEFORE PROVIDED FOR. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

The Government contends that Amcor's *Bivens* claims are subject to the one-year personal injury statute of limitations codified in California Code of Civil Procedure § 340(3). *Matthews v. Macanas*, 990 F.2d 467, 469 (9th Cir. 1993) (citing *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991). The Ninth Circuit has applied both of these statute [sic] of limitations to *Bivens* claims in two cases in 1993, one on February 3, 1993 (*Matthews*) and one on March 30, 1993 (*Gerritsen*).

The *Gerritsen* court applies Section 343 with no analysis, other than its citation to the *Gibson* case. The *Gibson*

case chose to apply Section 343 relying upon the *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980) decision. In deciding whether to apply the three-year statute of limitations for actions founded upon a statute and codified in California Code of Civil Procedure 338(1), or the Section 343 four-year statute of limitations, the *Marshall* Court chose to apply Section 343's four-year statute of limitations to a Fifth Amendment claim because the claim was based upon the Constitution and not a statute like a Section 1983 claim. 637 F.2d at 1224. The *Marshall* court did not consider the one-year personal injury statute of limitations because this case was decided before the Supreme Court decision in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985).

In *Wilson*, the Supreme Court determined that the personal injury statute of limitations best emphasized the personal nature of constitutional wrongs, including Section 1983 claims whose substantive force comes from the Constitution. *Wilson*, 471 U.S. at 277-279; 105 S.Ct. at 1947-1949. Further, the *Gibson* court discussed the *Wilson* ruling as follows:

> "5. The Supreme Court has yet to decide whether its reasoning in *Wilson v. Garcia* means that *Bivens* claims should also be analogized to state personal injury tort claims for limitations purposes. Recognizing that *Wilson* may require a re-examination of *Marshall v. Kleppe*, . . . we do not find this an appropriate occasion for so doing; even were we to overrule *Marshall*, we would not apply a shorter statute of limitations retroactively to bar claims such as plaintiffs'. . . . " (Citations omitted)

781 F.2d at 1342, footnote 5. Thus, the *Gibson* court recognized that the *Wilson* holding might be applied by the Supreme Court to overrule *Marshall*, but chose instead to defer the issue pending a decision by the Supreme Court on its applicability to *Bivens* actions.

Unlike *Gibson*, the Ninth Circuit in *Van Strum* applied the *Wilson* ruling to *Bivens* actions finding that Section 1983 and *Bivens* claims are identical except for the replacement of a state actor with a federal one and the *Wilson* rationale for applying a personal injury statute of limitations "applies with even greater force to *Bivens* actions, which come solely from the provisions of the Constitution protecting personal rights." 940 F.2d at 409-410.

This Court finds that the reasoning in *Wilson*, *Van Strum* and its progeny is well-taken. The *Gerritsen* court did not consider the *Wilson*, *Van Strum* and other relevant Ninth Circuit rulings, and this Court can only surmise that these cases were not provided to the court in *Gerritsen*. *See also McDougal v. County of Imperial*, 942 F.2d 668, 674 (9th Cir. 1991); *Harrison v. County of Alameda*, 720 F.Supp. 783, 787 (N.D.Cal. 1989) (citing *Del Percio v. Thornsley*, 877 F.2d 785, 786 (9th Cir. 1989). *Bivens* actions are subject to the applicable state personal injury statute of limitations. *Matthews*, 990 F.2d at 468; *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991); *McDougal v. County of Imperial*, 942 F.2d 668, 672 (9th Cir. 1991). In California, the statute of limitations for personal injury actions is one year as codified in California Code of Civil Procedure § 340(3), not the four-year catch-all statute of limitations codified in California Code of Civil Procedure § 343. *Harrison v. County of Alameda*, 720 F.Supp. at

787-788 (citing to post-*Wilson* cases which indicate that California's personal injury statute is Section 340(3)); *Keller v. United States*, 667 F.Supp. 1351, 1354 (S.D.Cal. 1987). By its own terms, Section 343 is to be resorted to only when no other limitations period applies.

At this stage, the Second, Sixth and Seventh Circuits already apply state personal injury statutes to *Bivens* claims. *Van Strum*, 940 F.2d at 410 (citing *Chin v. Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987); *McSurley v. Hutchinson*, 823 F.2d 1002, 1004-1005 (6th Cir. 1987), *cert. denied*, 485 U.S. 934, 108 S.Ct. 1107 (1988); *Bieneman v. City of Chicago*, 864 F.2d 463, 469 (7th Cir. 1988)). This Court agrees with the *Wilson*, *Van Strum* and *Harrison* cases finding that Section 1983 actions and *Bivens* claims are almost completely identical and therefore, the same statute of limitations should be applied to both. As a result, this Court finds that the appropriate statute of limitations to apply to Amcor's *Bivens* claims, the First, Second and Third Causes of Actions, is the Section 340(3) one-year personal injury statute of limitations.

In addition, federal law governs a determination of when the claim arose and therefore when the statute of limitations begins to run on the claim at issue. *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439, 1445 (9th Cir. 1994); *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). Under federal law, the claim accrues when the plaintiff knows or should have known of the subject injury. *Fobbs*, 29 F.3d at 1444; *Norco*, 801 F.2d at 1145; *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991); *Cline v. Brusset*, 661 F.2d 108, 110 (9th Cir.

1981). The continuing violation doctrine does not necessarily toll the statute where the plaintiff experiences continuing impact from past violations. *McDougal*, 942 F.2d at 674-675. Instead, it is the last overt act upon which the claim is based that dictates the commencement of the statute of limitations. *Gibson*, 781 F.2d at 1340.[1]

Here, the original Complaint was filed on October 12, 1994. Thus, Amcor's claims would be barred if they accrued prior to October 12, 1993 unless the statute of limitations was tolled. Several documents demonstrate that Amcor and its principals knew of their alleged claims against the majority of these defendants as early as December 1991 or at the latest by March 16, 1993. Although Amcor alleges throughout its First Amended Complaint that it did not discover the unauthorized disclosure until 1994, Amcor's own letters and internal memorandum indicate otherwise. *See* December 19, 1991 Letter from Roger M. Olsen, Esq. to Steven Murphy, Esq. attached as Exhibit "2" to the Declaration of Edward M.

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[1] In its opposition, Amcor argues that the statute of limitations was tolled (1) due to ongoing settlement discussions with the Government, (2) on the grounds of estoppel due to the Government's intentional refusal to produce documents and evidence to Amcor, (3) on the grounds of estoppel due to the Government's intentional concealment of facts, and (4) during Amcor's attempts to exhaust administrative remedies, and (5) by continuing violations. This Court rejects each of these arguments because Amcor's letters and internal memoranda demonstrate not only that Amcor was aware of all of the core facts which support its claims by 1991 or at the latest by March 1993 and was aware that it had statute of limitations problems. In addition, this Court finds that Amcor's letters to Congress do not constitute an exhaustion of administrative remedies.

Robins [sic], Jr.; June 17, 1992 Internal Memorandum to Amcor Shareholders And Limited Partners In American Agri-Corp Sponsored Partnerships; March 16, 1993 Letter from Barry Goverman of Amcor Capital Inc. to The Honorable Larry A. Compest, United States House of Representatives, attached as Exhibit "4" to the Robbins Decl. The 25-page December 19, 1991 Letter specifically states:

> "I will not list or outline for you all the various violations, for they are voluminous. However, in this criminal investigation, the pervasive violations of federal criminal statutes by federal investigators are material . . . I am not addressing merely a few isolated events, but a pervasive, and willful circumvention and disregard of legal principles and Federal statutes by both the Justice Department and the IRS.
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> There are a number of legal impediments that the Tax Division must now address:
>
> 1. A total and complete emasculation of the taxpayer privacy rules under Internal Revenue Code (Code) § 6103 and the referral provisions of Code § 7602(c)(2) by sharing a civil tax audit with a U.S. Attorney's Office to obtain immunity for a recalcitrant witness in that audit.
>
> 2. Violating the same statutes by illegally conducting administrative civil tax audits and criminal tax investigations with the Department of Agriculture and apparently sharing information about same.
>
> 3. The violation of the Fifth and Sixth Amendments by the corruption of the

attorney-client privilege and relationship by retaining as an undercover paid informant the services of the lawyer for an immunized witness.

4. The violation of the Fifth and Sixth Amendments by the illegal use of an attorney who, operating as a paid informant, attempted to and successfully did violate the attorney-client privilege of Behrens and others.

5. The violation of the Fifth and Sixth Amendments by the illegal and intentional intrusion and violation of the attorney-client privilege by the same informant who communicated directly with the outside counsel *after* the March 1989 search warrant was executed.

And there are more . . .

5/There is another violation by C.I.D., using an attorney for witness as a paid IRS informant in violation of IRS Guidelines.

7/ Based on the quantum of evidence establishing that Goolkasian and others in the IRS violated so many law enforcement internal guidelines, federal statutes and constitutional privileges, I question whether the statements attributed to Ted Frame in the Goolkasian affidavit to the search warrant are accurate or whether they are willfully misleading, and thus false, permitting the Court to exclude all of the evidence seized.

The affidavit to the search warrant in this investigation, executed by Wilbur Goolkasian on March 14, 1989, ("Affidavit") and the testimony

of Wendell Davies in his oral deposition . . . provides clear and uncontroverted evidence that all of the fruits of this entire investigation were tainted from the beginning an [sic] that both the Department of Justice and the Internal Revenue Service have willfully and deliberately conducted an investigation without regard to federal law . . .

The referral to the Justice Department resulted in the IRS and A.U.S.A. committing a felony, a violation of § 7213 of the Code. The investigation absolutely failed to satisfy the requirements of §§ 6103(h)(2) or 6103(i) of the Code . . .

In July 1989 the IRS issued the Tax Matters Partner ("TMP") of five AMCOR-related partnerships proposing civil tax adjustments. The TMP was required by the IRS to send a copy of each such notice to every investor, so there is no question about the level of review by the IRS of these notices . . . There is no known express statutory authority for the IRS to conduct a joint investigation with the Department of Agriculture, without simultaneously violating Code §§ 6103 and 7213. Formal discovery will ascertain the exact violation here . . .

From the fruits of that illegal process, Special Agent Martin provided information to Goolkasian. Running rough shod over federal law enforcement procedures and statutes, neither Special Agent Martin nor Laurence ever bothered to consider whether or not either had proper authority to conduct a civil tax audit or criminal investigation in this fashion. No A.U.S.A., Laurence included, had any authority whatsoever, to grant immunity to anyone in

connection with an IRS administrative audit or investigation, yet that is exactly what happened.

The immunity having been secured in direct violation of §§ 6103 and 7602(c) of the Code, the agents and Laurence thereby committed a felony in violation under Code § 7213, as well as 18 U.S.C. Section 371, by a wilful violation of a known legal duty, thereby impairing the IRS in the lawful audit function.12/

12/ There are other violations as well. See *United States v. Twell*, 550 F.2d 297 (5th Cir. 1977) since the IRS actually attempted to mislead the taxpayers into thinking that Davies, ostensibly as co-counsel, was assisting in legally representing a third person in a civil tax audit, when in fact it was a criminal investigation . . .

What Goolkasian does not expressly state is whether or not he had direct contact with A.U.S.A. Laurence in this investigation. Wendall Davies testified that Goolkasian did discuss this case with A.U.S.A. Laurence, and like Special Agent Martin, it is doubtful that they discussed ode [sic] § 6103. Naturally we assume that the government is prepared to answer that question for again it would involve ascertaining whether or not the Internal Revenue Service again conducted an investigation concurrently with a prosecutor in the Department of Justice, in direct violation of every known requirement for a special agent, the Internal Revenue Service, and the Department of Justice.

Violating federal statutes, ignoring internal departmental guidelines, disregarding statutorily protected privileges, desecrating at least the Fifth and Sixth Amendments to the U.S. Constitution, the government would do well to

> consider disciplinary action, and perhaps more of its own governmental agents, rather than seeking to cleanse itself with an indictment that will become misconduct."

The July 8, 1992 Memorandum is also attached as Exhibit 2 to the Robbins Decl. Further, the June 17, 1992 Memorandum sets forth the impropriety of the thirty-day letters, the fraud contained in those letters, "*pattern* of blatant Government misconduct directed at AMCOR and its investors", the Government's involvement with the Department of Agriculture and the Government cover-up of the misconduct. This June 17, 1992 Memorandum also indicates Amcor's intention to expose the governmental wrongdoing and seek redress.

In addition, the March 16, 1993 Letter specifically states:

> "Although the events are described chronologically, they became known to us based, largely, on *sworn testimony* obtained through civil litigation in the U.S. District Court between 1990 and 1993. The evidence not only sets forth the *facts* but portrays a pattern of pervasive violations of federal criminal statutes by federal investigators. Counsel has advised that, from a criminal defense standpoint, when there are such violations perpetrated by federal government agents, such violations constitute a complete defense – a *legal impediment* to further investigation. What our documentation will prove is not merely the occurrence of a few isolated events by incompetent bureaucrats, but a premeditated and willful circumvention of and arrogant disregard for legal principals and federal statutes – both by the Justice Department (not the Tax Division)

> and the IRS. In the interest of brevity some of the impediments that discovery has revealed are: . . .
>
> > (vi) Confession to IRS CID agents by the Executive Director of the Swisher County Texas A.S.C.S. (USDA) that he conspired and took bribes from a farmer to prepare fraudulent farming contracts from official USDA records, and then the CID agents intentionally covered-up the confession in favor of pursuing and continuing to damage AMCOR and its limited partners . . .
>
> Moreover, AMCOR and its partners should be compensated, at a minimum, for the enormous legal costs that have occurred, which to date approximate $9 million. Actual damages both to the business enterprise and private U.S. citizens are incalculable, and it is likely that fiduciary responsibility to our limited partners mandates that a lawsuit be filed against the U. S. Government. There is no question that certain government agents should be prosecuted, although unfortunately we are advised that the statute of limitations may have expired on many of their criminal acts."

In addition, Amcor enclosed with the March 16, 1993 Letter the "Chronology Of Events Of IRS Misconduct" which specifically identified defendants Vince Capobianco, Wilbur Goolkasian, Bobby Jack Tadlock and their involvement in the alleged conspiracy against Amcor.

Amcor alleges that Asch and Friedman participating [sic] in misrepresenting the purpose for seeking the stay of the civil proceeding in failing to disclose that he was

directed by the Examination Division of the IRS to seek the stay to buy time for the Examination Division to complete its work on the civil cases without having respond to discovery. Amcor alleges that Asch, Nied and Shipley omitted exculpatory evidence from the IRS grand jury referral. Amcor alleges that defendants Cota, Coy, Friedman, McEwan, Rickus, Shipley and Winter were involved in the leaking of grand jury material in violation of Rule 6(e)(2) of the Federal Rules of Criminal Procedure. Amcor alleges that Coy, Mudd, Rickus and Winter violated internal IRS guidelines during the Amcor civil and criminal investigations. Amcor alleges that Larson participated in the destruction of exculpatory and other documentary evidence in violation of IRS internal policies. Amcor alleges that McEwan, Mudd, Phillips and Rickus were involved in continuing the civil investigation against Amcor where there was evidence of fraud in violation of IRS guidelines regarding the suspension of civil audits. Amcor alleges that McEwan threatened agents Watson and Russell. Amcor alleges that Morin and Winter lied to Congress regarding certain the [sic] thirty-day letters issued by Amcor at the Government's request. Amcor alleges that Mudd failed to give Miranda warnings to Amcor representatives Behrens, Jones and Amcor attorney Frame at a meeting between them and defendants Mudd and Phillips. Amcor alleges that the IRS and Mudd are required to provide Amcor notice of a criminal investigation, including notice of criminal liability for conspiracy, preparing false returns, failing to file returns or of an impending indictment. Amcor alleges that Mudd should have taken notes in meeting with principals of Amcor and failed to do so.

Though Amcor may not have been aware of the identities of all of the Individual Defendants as of June 1992, Amcor's December 1991 Memorandum and its June 17, 1992 Letter demonstrate that Amcor was aware of the aforementioned allegations and the alleged conspiracy by the Government's agents and/or employees by December 1991 or at the latest by June 17, 1992. If Amcor had not sat on its claims and filed its complaint in a timely fashion, Amcor would have preserved its claims, could have sought discovery to determine the identities of the all of the Individual Defendants and sought leave to amend to name any of the Individual Defendants whose identities Amcor was not previously aware. By waiting, Amcor took a calculated risk that its claims against these defendants would be time-barred. This Court finds that the filing of Amcor's original complaint was untimely.[2] Therefore, all of Amcor's claims, the First, Second, Third and Fourth Claims for Relief in the First Amended Complaint are barred by the one-year statute of limitations codified in California Code of Civil Procedure § 340(3) as to the Individual Defendants and this Court **grants** the Individual Defendants' Motions For Summary Judgment in favor of the defendants Harry M. Asch, Vincent Capobianco, Jesse Cota, Naomi Coy, Miles D. Friedman, Wilbur Goolkasian, Phillip Larson, James Laurence, George Martin, Wayne McEwan, Gayle Morin, Joe Mudd, Robert Nied, Bobby Jack Tadlock, Tom Phillips, Michael

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[2] Because this Court relies upon evidence extrinsic to the Complaint in arriving at its decision herein, the present motion on the statute of limitations defense will be treated as one for summary judgment pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure.

Rickus, William K. Shipley, Allen Silverman, Pete Tagni, Douglas Watson, Lynda Winter.[3]

IT IS SO ORDERED.

DATED: JUN 12 1995 /s/ DICKRAN TEVRIZIAN
Dickran Tevrizian, Judge
United States
District Court

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[3] Based upon this Court's ruling herein, this Court does not reach the substantive merits or lack thereof of Amcor's allegations against the Individual Defendants.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasaonble searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State

shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title 26 of the United States Code, section 6103, provides:

§ 6103. Confidentiality and disclosure of returns and return information

(a) **General rule**. Returns and return information shall be confidential, and except as authorized by this title –

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the

provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) **Definitions**. For purposes of this section –

(1) **Return**. The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) **Return information**. The term "return information" means –

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined

in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) **Taxpayer return information**. The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) **Tax administration**. The term "tax administration" –

(A) means –

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

(5) **State**. The term "State" means –

(A) any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and

(B) for purposes of subsections (a)(2), (b)(4), (d)(1), (h)(4), and (p) any municipality –

(i) with a population in excess of 250,000 (as determined under the most recent decennial United States census data available),

(ii) which imposes a tax on income or wages, and

(iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.

(6) **Taxpayer identity**. The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

(7) **Inspection**. The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) **Disclosure**. The term "disclosure" means the making known to any person in any manner whatever a return or return information.

(9) **Federal agency**. The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.

(10) **Chief executive officer**. The term "chief executive officer" means, with respect to any municipality, any elected official and the chief official (even if not elected) of such municipality.

(c) **Disclosure of returns and return information to designee of taxpayer**. The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

(d) **Disclosure to State tax officials and State and local law enforcement agencies.** (1) In general. Returns and return information with respect to taxes imposed by chapters 1, 2, 6, 11, 12, 21, 23, 24, 31, 32, 44, 51, and 52 and subchapter D of chapter 36 shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws, including any procedures with respect to locating any person who may be entitled to a refund. Such inspection shall be permitted, or such disclosure

made, only upon written request by the head of such agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such written request as the individuals who are to inspect or to receive the returns or return information on behalf of such agency, body, or commission. Such representatives shall not include any individual who is the chief executive officer of such State or who is neither an employee or legal representative of such agency, body, or commission nor a person described in subsection (n). However, such return information shall not be disclosed to the extent that the Secretary determines that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation.

(2) **Disclosure to State audit agencies.** (A) In general. Any returns or return information obtained under paragraph (1) by any State agency, body, or commission may be open to inspection by, or disclosure to, officers and employees of the State audit agency for the purpose of, and only to the extent necessary in, making an audit of the State agency, body, or commission referred to in paragraph (1).

(B) State audit agency. For purposes of subparagraph (A), the term "State audit agency" means any State agency, body, or commission which is charged under the laws of the State with the responsibility of auditing State revenues and programs.

(3) **Exception for reimbursement under section 7624.** Nothing in this section shall be construed to prevent the Secretary from disclosing to any State or local law enforcement agency which may receive a payment under section 7624 the amount of the

recovered taxes with respect to which such a payment may be made.

(4) **[Caution: For postponement of effective date of this paragraph with respect to certain States, see P.L. 103-66, Sec. 13444(b), which appears as a note to this section.]** Availability and use of death information.

(A) In general. No returns or return information may be disclosed under paragraph (1) to any agency, body, or commission of any State (or any legal representative thereof) during any period during which a contract meeting the requirements of subparagraph (B) is not in effect between such State and the Secretary of Health and Human Services.

(B) Contractual requirements. A contract meets the requirements of this subparagraph if –

(i) such contract requires the State to furnish the Secretary of Health and Human Services information concerning individuals with respect to whom death certificates (or equivalent documents maintained by the State or any subdivision thereof) have been officially filed with it, and

(ii) such contract does not include any restriction on the use of information obtained by such Secretary pursuant to such contract, except that such contract may provide that such information is only to be used by the Secretary (or any other Federal agency) for purposes of ensuring that Federal benefits or other payments are not erroneously paid to deceased individuals.

Any information obtained by the Secretary of Health and Human Services under such a contract shall be exempt from disclosure under section 552 of title 5, United States Code, and from the requirements of section 552a of such title 5.

(C) Special exception. The provisions of subparagraph (A) shall not apply to any State which on July 1, 1993, was not, pursuant to a contract, furnishing the Secretary of Health and Human Services information concerning individuals with respect to whom death certificates (or equivalent documents maintained by the State or any subdivision thereof) have been officially filed with it.

(e) **Disclosure to persons having material interest.** (1) **In general.** The return of a person shall, upon written request, be open to inspection by or disclosure to –

(A) in the case of the return of an individual –

(i) that individual,

(ii) if property transferred by that individual to a trust is sold or exchanged in a transaction described in section 644, the trustee or trustees, jointly or separately, of such trust to the extent necessary to ascertain any amount of tax imposed upon the trust by section 644,

(iii) the spouse of that individual if the individual and such spouse have signified their consent to consider a gift reported on such return as made one-half by him and one-half by the spouse pursuant to the provisions of section 2513; or

(iv) the child of that individual (or such child's legal representative) to the extent necessary to comply with the provisions of section 1(g) or 59(j);

(B) in the case of an income tax return filed jointly, either of the individuals with respect to whom the return is filed;

(C) in the case of the return of a partnership, any person who was a member of such partnership during any part of the period covered by the return;

(D) in the case of the return of a corporation or a subsidiary thereof –

(i) any person designated by resolution of its board of directors or other similar governing body,

(ii) any officer or employee of such corporation upon written request signed by any principal officer and attested to by the secretary or other officer,

(iii) any bona fide shareholder of record owning 1 percent or more of the outstanding stock of such corporation,

(iv) if the corporation was a foreign personal holding company, as defined by section 552, any person who was a shareholder during any part of a period covered by such return if with respect to that period, or any part thereof, such shareholder was required under section 551 to include in his gross income undistributed foreign personal holding company income of such company,

(v) if the corporation was an electing small business corporation under subchapter S of

chapter 1, any person who was a shareholder during any part of the period covered by such return during which an election was in effect, or

(vi) if the corporation has been dissolved, any person authorized by applicable State law to act for the corporation or any person who the Secretary finds to have a material interest which will be affected by information contained therein;

(E) in the case of the return of an estate –

(i) the administrator, executor, or trustee of such estate, and

(ii) any heir at law, next of kin, or beneficiary under the will, of the decedent, but only if the Secretary finds that such heir at law, next of kin, or beneficiary has a material interest which will be affected by information contained therein; and

(F) in the case of the return of a trust –

(i) the trustee or trustees, jointly or separately, and

(ii) any beneficiary of such trust, but only if the Secretary finds that such beneficiary has a material interest which will be affected by information contained therein.

(2) **Incompetency.** If an individual described in paragraph (1) is legally incompetent, the applicable return shall, upon written request, be open to inspection by or disclosure to the committee, trustee, or guardian of his estate.

(3) **Deceased individuals.** The return of a decedent shall, upon written request, be open to inspection by or disclosure to –

(A) the administrator, executor, or trustee of his estate, and

(B) any heir at law, next of kin, or beneficiary under the will, of such decedent, or a donee of property, but only if the Secretary finds that such heir at law, next of kin, beneficiary, or donee has a material interest which will be affected by information contained therein.

(4) **Title 11 cases and receivership proceedings.** If –

(A) there is a trustee in a title 11 case in which the debtor is the person with respect to whom the return is filed, or

(B) substantially all of the property of the person with respect to whom the return is filed is in the hands of a receiver,

such return or returns for prior years of such person shall, upon written request, be open to inspection by or disclosure to such trustee or receiver, but only if the Secretary finds that such trustee or receiver, in his fiduciary capacity, has a material interest which will be affected by information contained therein.

(5) **Individual's title 11 case.** (A) In general. In any case to which section 1398 applies (determined without regard to section 1398(b)(1)), any return of the debtor for the taxable year in which the case commenced or any preceding taxable year shall, upon written request, be open to inspection by or disclosure to the trustee in such case.

(B) Return of estate available to debtor. Any return of an estate in a case to which section

1398 applies shall, upon written request, be open to inspection by or disclosure to the debtor in such case.

(C) Special rule for involuntary cases. In an involuntary case, no disclosure shall be made under subparagraph (A) until the order for relief has been entered by the court having jurisdiction of such case unless such court finds that such disclosure is appropriate for purposes of determining whether an order for relief should be entered.

(6) **Attorney in fact.** Any return to which this subsection applies shall, upon written request, also be open to inspection by or disclosure to the attorney in fact duly authorized in writing by any of the persons described in paragraph (1), (2), (3), (4), or (5) to inspect the return or receive the information on his behalf, subject to the conditions provided in such paragraphs.

(7) **Return information.** Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

(8) **Disclosure of collection activities with respect to joint return.** If any deficiency of tax with respect to a joint return is assessed and the individuals filing such return are no longer married or no longer reside in the same household, upon request in writing by either of such individuals, the Secretary shall disclose in writing to the individual making the request whether the Secretary has attempted to collect such deficiency from such other individual, the general nature of such collection activities, and the amount collected. The preceding sentence shall not

apply to any deficiency which may not be collected by reason of section 6502.

(9) Disclosure of certain information where more than 1 person subject to penalty under section 6672. If the Secretary determines that a person is liable for a penalty under section 6672(a) with respect to any failure, upon request in writing of such person, the Secretary shall disclose in writing to such person –

(A) the name of any other person whom the Secretary has determined to be liable for such penalty with respect to such failure, and

(B) whether the Secretary has attempted to collect such penalty from such other person, the general nature of such collection activities, and the amount collected.

(f) **Disclosure to Committees of Congress.** (1) Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation. Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(2) Chief of Staff of Joint Committee on Taxation. Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit

such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(3) **Other committees**. Pursuant to an action by, and upon written request by the chairman of, a committee of the Senate or the House of Representatives (other than a committee specified in paragraph (1)) specially authorized to inspect any return or return information by a resolution of the Senate or the House of Representatives or, in the case of a joint committee (other than the joint committee specified in paragraph (1)) by concurrent resolution, the Secretary shall furnish such committee, or a duly authorized and designated subcommittee thereof, sitting in closed executive session, with any return or return information which such resolution authorizes the committee or subcommittee to inspect. Any resolution described in this paragraph shall specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.

(4) **Agents of committees and submission of information to Senate or House of Representatives**. (A) Committees described in paragraph (1). Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such

manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(B) Other committees. Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive

session unless such taxpayer otherwise consents in writing to such disclosure.

(g) **Disclosure to President and certain other persons.** (1) **In general.** Upon written request by the President, signed by him personally, the Secretary shall furnish to the President, or to such employee or employees of the White House Office as the President may designate by name in such request, a return or return information with respect to any taxpayer named in such request. Any such request shall state –

(A) the name and address of the taxpayer whose return or return information is to be disclosed,

(B) the kind of return or return information which is to be disclosed,

(C) the taxable period or periods covered by such return or return information, and

(D) the specific reason why the inspection or disclosure is requested.

(2) **Disclosure of return information as to Presidential appointees and certain other Federal Government appointees.** The Secretary may disclose to a duly authorized representative of the Executive Office of the President or to the head of any Federal agency, upon written request by the President or head of such agency, or to the Federal Bureau of Investigation on behalf of and upon written request by the President or such head, return information with respect to an individual who is designated as being under consideration for appointment to a position in the executive or judicial branch of the Federal Government. Such return information shall be limited to whether such individual –

(A) has filed returns with respect to the taxes imposed under chapter 1 for not more than the immediately preceding 3 years;

(B) has failed to pay any tax within 10 days after notice and demand, or has been assessed any penalty under this title for negligence, in the current year or immediately preceding 3 years;

(C) has been or is under investigation for possible criminal offenses under the internal revenue laws and the results of any such investigation; or

(D) has been assessed any civil penalty under this title for fraud.

Within 3 days of the receipt of any request for any return information with respect to any individual under this paragraph, the Secretary shall notify such individual in writing that such information has been requested under the provisions of this paragraph.

(3) **Restriction on disclosure**. The employees to whom returns and return information are disclosed under this subsection shall not disclose such returns and return information to any other person except the President or the head of such agency without the personal written direction of the President or the head of such agency.

(4) **Restriction on disclosure to certain employees**. Disclosure of returns and return information under this subsection shall not be made to any employee whose annual rate of basic pay is less than the annual rate of basic pay specified for positions subject to section 5316 of title 5, United States Code.

(5) **Reporting requirements**. Within 30 days after the close of each calendar quarter, the President and

the head of any agency requesting returns and return information under this subsection shall each file a report with the Joint Committee on Taxation setting forth the taxpayers with respect to whom such requests were made during such quarter under this subsection, the returns or return information involved, and the reasons for such requests. The President shall not be required to report on any request for returns and return information pertaining to an individual who was an officer or employee of the executive branch of the Federal Government at the time such request was made. Reports filed pursuant to this paragraph shall not be disclosed unless the Joint Committee on Taxation determines that disclosure thereof (including identifying details) would be in the national interest. Such reports shall be maintained by the Joint Committee on Taxation for a period not exceeding 2 years unless, within such period, the Joint Committee on Taxation determines that a disclosure to the Congress is necessary.

(h) **Disclosure to certain Federal officers and employees for purposes of tax administration, etc.**

(1) **Department of the Treasury**. Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.

(2) **Department of Justice**. In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may

result in such a proceeding) before a Federal grand jury or any Federal or State court, but only if –

(A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;

(B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or

(C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.

(3) **Form of request**. In any case in which the Secretary is authorized to disclose a return or return information to the Department of Justice pursuant to the provisions of this subsection –

(A) if the Secretary has referred the case to the Department of Justice, or if the proceeding is authorized by subchapter B of chapter 76, the Secretary may make such disclosure on his own motion, or

(B) if the Secretary receives a written request from the Attorney General, the Deputy Attorney General, or an Assistant Attorney General for a return of, or return information relating to, a person named in such request and setting forth the need for the disclosure, the Secretary shall disclose return or return the information so requested.

(4) **Disclosure in judicial and administrative tax proceedings.** A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only –

(A) the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;

(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;

(C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or

(D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.

However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

(5) **Prospective jurors.** In connection with any judicial proceeding described in paragraph (4) to

which the United States is a party, the Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

(6) **Withholding of tax from social security benefits.** Upon written request of the payor agency, the Secretary may disclose available return information from the master files of the Internal Revenue Service with respect to the address and status of an individual as a nonresident alien or as a citizen or resident of the United States to the Social Security Administration or the Railroad Retirement Board (whichever is appropriate) for purposes of carrying out its responsibilities for withholding tax under section 1441 from social security benefits (as defined in section 86(d)).

(i) **Disclosure to Federal officers or employees for administration of Federal laws not relating to tax administration. (1) Disclosure of returns and return information for use in criminal investigations.** (A) In general. Except as provided in paragraph (6), any return or return information with respect to any specified taxable period or periods shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency who are personally and directly engaged in –

(i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party,

(ii) any investigation which may result in such a proceeding, or

(iii) any Federal grand jury proceeding pertaining to enforcement of such a criminal statute to which the United States or such agency is or may be a party,

solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.

(B) Application for order. The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States attorney, any special prosecutor appointed under section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States Code, may authorize an application to a Federal district court judge or magistrate for the order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that –

(i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed,

(ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act, and

(iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

(2) **Disclosure of return information other than taxpayer return information for use in criminal investigations**. (A) In general. Except as provided in paragraph (6), upon receipt by the Secretary of a request which meets the requirements of subparagraph (B) from the head of any Federal agency or the Inspector General thereof, or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, any United States attorney, any special prosecutor appointed under section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States Code, the Secretary shall disclose return information (other than taxpayer return information) to officers and employees of such agency who are personally and directly engaged in –

(i) preparation for any judicial or administrative proceeding described in paragraph (1)(A)(i),

(ii) any investigation which may result in such a proceeding, or

(iii) any grand jury proceeding described in paragraph (1)(A)(iii),

solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.

(B) Requirements. A request meets the requirements of this subparagraph if the request is in writing and sets forth –

(i) the name and address of the taxpayer with respect to whom the requested return information relates;

(ii) the taxable period or periods to which such return information relates;

(iii) the statutory authority under which the proceeding or investigation described in subparagraph (A) is being conducted; and

(iv) the specific reason or reasons why such disclosure is, or may be, relevant to such proceeding or investigation.

(C) Taxpayer identity. For purposes of this paragraph, a taxpayer's identity shall not be treated as taxpayer return information.

(3) **Disclosure of return information to apprise appropriate officials of criminal activities or emergency circumstances**. (A) Possible violations of Federal criminal law. –

(i) In general. Except as provided in paragraph (6), the Secretary may disclose in writing return information (other than taxpayer return information) which may constitute evidence of a violation of any Federal criminal law (not involving tax administration) to the extent necessary to apprise the head of the appropriate Federal agency charged with the responsibility of enforcing such law. The head of such agency may disclose such return information to officers and employees of such agency to the extent necessary to enforce such law.

(ii) Taxpayer identity. If there is return information (other than taxpayer return information) which may constitute evidence of a violation by any taxpayer of any Federal criminal law (not involving tax administration), such taxpayer's identity may also be disclosed under clause (i).

(B) Emergency circumstances. –

(i) Danger of death or physical injury. Under circumstances involving an imminent danger of death or physical injury to any individual, the Secretary may disclose return information to the extent necessary to apprise appropriate officers or employees of any Federal or State law enforcement agency of such circumstances.

(ii) Flight from Federal prosecution. Under circumstances involving the imminent flight of any individual from Federal prosecution, the Secretary may disclose return information to the extent necessary to apprise appropriate officers or employees of any Federal

law enforcement agency of such circumstances.

(4) **Use of certain disclosed returns and return information in judicial or administrative proceedings.** (A) Returns and taxpayer return information. Except as provided in subparagraph (C), any return or taxpayer return information obtained under paragraph (1) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a specifically designated Federal criminal statute or related civil forfeiture (not involving tax administration) to which the United States or a Federal agency is a party –

(i) if the court finds that such return or taxpayer return information is probative of a matter in issue relevant in establishing the commission of a crime or the guilt or liability of a party, or

(ii) to the extent required by order of the court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure.

(B) Return information (other than taxpayer return information). Except as provided in subparagraph (C), any return information (other than taxpayer return information) obtained under paragraph (1), (2), or (3)(A) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a specifically designated Federal criminal statute or related civil forfeiture (not involving tax administration) to which the United States or a Federal agency is a party.

(C) Confidential informant; impairment of investigations. No return or return information shall be admitted into evidence under subparagraph (A)(i) or (B) if the Secretary determines and notifies the Attorney General or his delegate or the head of the Federal agency that such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation.

(D) Consideration of confidentiality policy. In ruling upon the admissibility of returns or return information, and in the issuance of an order under subparagraph (A)(ii), the court shall give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.

(E) Reversible error. The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in the proceeding.

(5) **Disclosure to locate fugitives from justice.** (A) In general. Except as provided in paragraph (6), the return of an individual or return information with respect to such individual shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency exclusively for use in locating such individual.

(B) Application for order. Any person described in paragraph (1)(B) may authorize an application to a Federal district court judge or

magistrate for an order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that –

(i) a Federal arrest warrant relating to the commission of a Federal felony offense has been issued for an individual who is a fugitive from justice,

(ii) the return of such individual or return information with respect to such individual is sought exclusively for use in locating such individual, and

(iii) there is reasonable cause to believe that such return or return information may be relevant in determining the location of such individual.

(6) **Confidential informants; impairment of investigations.** The Secretary shall not disclose any return or return information under paragraph (1), (2), (3)(A), (5), or (7) if the Secretary determines (and, in the case of a request for disclosure pursuant to a court order described in paragraph (1)(B) or (5)(B), certifies to the court) that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

(7) **Comptroller General.** (A) Returns available for inspection. Except as provided in subparagraph (C), upon written request by the Comptroller General of the United States, returns and return information shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making –

(i) an audit of the Internal Revenue Service or the Bureau of Alcohol, Tobacco and Firearms which may be required by section 713 of title 31, United States Code, or

(ii) any audit authorized by subsection (p)(6),

except that no such officer or employee shall, except to the extent authorized by subsection (f) or (p)(6), disclose to any person, other than another officer or employee of such office whose official duties require such disclosure, any return or return information described in section 4424(a) in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, nor shall such officer or employee disclose any other return or return information, except as otherwise expressly provided by law, to any person other than such other officer or employee of such office in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(B) Audits of other agencies.

(i) In general. Nothing in this section shall prohibit any return or return information obtained under this title by any Federal agency (other than an agency referred to in subparagraph (A)) for use in any program or activity from being open to inspection by, or disclosure to, officers and employees of the General Accounting Office if such inspection or disclosure is –

(I) for purposes of, and to the extent necessary in, making an audit authorized by law of such program or activity, and

(II) pursuant to a written request by the Comptroller General of the United States to the head of such Federal agency.

(ii) Information from Secretary. If the Comptroller General of the United States determines that the returns or return information available under clause (i) are not sufficient for purposes of making an audit of any program or activity of a Federal agency (other than an agency referred to in subparagraph (A)), upon written request by the Comptroller General to the Secretary, returns and return information (of the type authorized by subsection (l) or (m) to be made available to the Federal agency for use in such program or activity) shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making such audit.

(iii) Requirement of notification upon completion of audit. Within 90 days after the completion of an audit with respect to which returns or return information were opened to inspection or disclosed under clause (i) or (ii), the Comptroller General of the United States shall notify in writing the Joint Committee on Taxation of such completion. Such notice shall include –

(I) a description of the use of the returns and return information by the Federal agency involved,

(II) such recommendations with respect to the use of returns and return information by such Federal agency as the Comptroller General deems appropriate, and

(III) a statement on the impact of any such recommendations on confidentiality of returns and return information and the administration of this title.

(iv) Certain restrictions made applicable. The restrictions contained in subparagraph (A) on the disclosure of any returns or return information open to inspection or disclosed under such subparagraph shall also apply to returns and return information open to inspection or disclosed under this subparagraph.

(C) Disapproval by Joint Committee on Taxation. Returns and return information shall not be open to inspection or disclosed under subparagraph (A) or (B) with respect to an audit –

(i) unless the Comptroller General of the United States notifies in writing the Joint Committee on Taxation of such audit, and

(ii) if the Joint Committee on Taxation disapproves such audit by a vote of at least two-thirds of its members within the 30-day period beginning on the day the Joint Committee on Taxation receives such notice.

(8) [Deleted]

(j) **Statistical use. (1) Department of Commerce.** Upon request in writing by the Secretary of Commerce, the Secretary shall furnish –

(A) such returns, or return information reflected thereon, to officers and employees of the Bureau of the Census, and

(B) such return information reflected on returns of corporations to officers and employees of the Bureau of Economic Analysis,

as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law.

(2) **Federal Trade Commission.** Upon request in writing by the Chairman of the Federal Trade Commission, the Secretary shall furnish such return information reflected on any return of a corporation with respect to the tax imposed by chapter 1 to officers and employees of the Division of Financial Statistics of the Bureau of Economics of such commission as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, administration by such division of legally authorized economic surveys of corporations.

(3) **Department of Treasury.** Returns and return information shall be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for the purpose of, but only to the extent necessary in, preparing economic or financial forecasts, projections, analyses, and statistical studies and conducting related activities. Such

inspection or disclosure shall be permitted only upon written request which sets forth the specific reason or reasons why such inspection or disclosure is necessary and which is signed by the head of the bureau or office of the Department of the Treasury requesting the inspection or disclosure.

(4) **Anonymous form**. No person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(k) **Disclosure of certain returns and return information for tax administration purposes**. (1) **Disclosure of accepted offers-in-compromise**. Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.

(2) **Disclosure of amount of outstanding lien**. If a notice of lien has been filed pursuant to section 6323(f), the amount of the outstanding obligation secured by such lien may be disclosed to any person who furnishes satisfactory written evidence that he has a right in the property subject to such lien or intends to obtain a right in such property.

(3) **Disclosure of return information to correct misstatements of fact**. The Secretary may, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any

transaction of the taxpayer with the Internal Revenue Service.

(4) **Disclosure to competent authority under tax convention**. A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information, with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement.

(5) **State agencies regulating tax return preparers**. Taxpayer identity information with respect to any income tax return preparer, and information as to whether or not any penalty has been assessed against such income tax return preparer under section 6694, 6695, or 7216, may be furnished to any agency, body, or commission lawfully charged under any State or local law with the licensing, registration, or regulation of income tax return preparers. Such information may be furnished only upon written request by the head of such agency, body, or commission designating the officers or employees to whom such information is to be furnished. Information may be furnished and used under this paragraph only for purposes of the licensing, registration, or regulation of income tax return preparers.

(6) **Disclosure by internal revenue officers and employees for investigative purposes**. An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which

is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

(7) **Disclosure of excise tax registration information.** To the extent the Secretary determines that disclosure is necessary to permit the effective administration of subtitle D, the Secretary may disclose –

(A) the name, address, and registration number of each person who is registered under any provision of subtitle D (and, in the case of a registered terminal operator, the address of each terminal operated by such operator), and

(B) the registration status of any person.

(l) **Disclosure of returns and return information for purposes other than tax administration.** (1) **Disclosure of certain returns and return information to Social Security Administration and Railroad Retirement Board.** The Secretary may, upon written request, disclose returns and return information with respect to –

(A) taxes imposed by chapters 2, 21, and 24, to the Social Security Administration for purposes of its administration of the Social Security Act;

(B) a plan to which part I of subchapter D of chapter 1 applies, to the Social Security Administration for purposes of carrying out its responsibility under section 1131 of the Social Security Act, limited, however to return information described in section 6057(d); and

(C) taxes imposed by chapter 22, to the Railroad Retirement Board for purposes of its administration of the Railroad Retirement Act.

(2) **Disclosure of returns and return information to the Department of Labor and Pension Benefit Guaranty Corporation**. The Secretary may, upon written request, furnish returns and return information to the proper officers and employees of the Department of Labor and the Pension Benefit Guaranty Corporation for purposes of, but only to the extent necessary in, the administration of titles I and IV of the Employee Retirement Income Security Act of 1974.

(3) **Disclosure that applicant for Federal loan has tax delinquent account**. (A) In general. Upon written request, the Secretary may disclose to the head of the Federal agency administering any included Federal loan program whether or not an applicant for a loan under such program has a tax delinquent account.

(B) Restriction on disclosure. Any disclosure under subparagraph (A) shall be made only for the purpose of, and to the extent necessary in, determining the creditworthiness of the applicant for the loan in question.

(C) Included Federal loan program defined. For purposes of this paragraph, the term "included Federal loan program" means any program under which the United States or a Federal agency makes, guarantees, or insures loans.

(4) **Disclosure of returns and return information for use in personnel or claimant representative matters**. The Secretary may disclose returns and return information –

(A) upon written request –

(i) to an employee or former employee of the Department of the Treasury, or to the duly authorized legal representative of such employee or former employee, who is or may be a party to any administrative action or proceeding affecting the personnel rights of such employee or former employee; or

(ii) to any person, or to the duly authorized legal representative of such person, whose rights are or may be affected by an administrative action or proceeding under section 330 of title 31, United States Code,

solely for use in the action or proceeding, or in preparation for the action or proceeding, but only to the extent that the Secretary determines that such returns or return information is or may be relevant and material to the action or proceeding; or

(B) to officers and employees of the Department of the Treasury for use in any action or proceeding described in subparagraph (A), or in preparation for such action or proceeding, to the extent necessary to advance or protect the interests of the United States.

(5) **Social Security Administration**. Upon written request by the Commissioner of Social Security, the Secretary may disclose information returns filed pursuant to part III of subchapter A of chapter 61 of this subtitle for the purpose of –

(A) carrying out, in accordance with an agreement entered into pursuant to section 232

of the Social Security Act, an effective return processing program; or

(B) providing information regarding the mortality status of individuals for epidemiological and similar research in accordance with section 1106(d) of the Social Security Act.

(6) **Disclosure of return information to Federal, State, and local child support enforcement agencies.** (A) Return information from Internal Revenue Service. The Secretary may, upon written request, disclose to the appropriate Federal, State, or local child support enforcement agency –

(i) available return information from the master files of the Internal Revenue Service relating to the social security account number (or numbers, if the individual involved has more than one such number), address, filing status, amounts and nature of income, and the number of dependents reported on any return filed by, or with respect to, any individual with respect to whom child support obligations are sought to be established or enforced pursuant to the provisions of part D of title IV of the Social Security Act and with respect to any individual to whom such support obligations are owing, and

(ii) available return information reflected on any return filed by, or with respect to, any individual described in clause (i) relating to the amount of such individual's gross income (as defined in section 61) or consisting of the names and addresses of payors of such income and the names of any dependents reported on

such return, but only if such return information is not reasonably available from any other source.

(B) Restriction on disclosure. The Secretary shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations.

(7) **Disclosure of return information to Federal, State, and local agencies administering certain programs under the Social Security Act, the Food Stamp Act of 1977 or title 38, United States Code, or certain housing assistance programs.** (A) Return information from Social Security Administration. The Commissioner of Social Security shall, upon written request, disclose return information from returns with respect to net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income, which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5) of this subsection, to any Federal, State, or local agency administering a program listed in subparagraph (D).

(B) Return information from Internal Revenue Service. The Secretary shall, upon written request, disclose current return information from returns with respect to unearned income from the Internal Revenue Service files to any Federal, State, or local agency administering a program listed in subparagraph (D).

(C) Restriction on disclosure. The Commissioner of Social Security and the Secretary shall disclose return information under subparagraphs (A) and (B) only for purposes of,

and to the extent necessary in, determining eligibility for, or the correct amount of, benefits under a program listed in subparagraph (D).

(D) Programs to which rule applies. The programs to which this paragraph applies are:

(i) aid to families with dependent children provided under a State plan approved under part A of title IV of the Social Security Act;

(ii) medical assistance provided under a State plan approved under title XIX of the Social Security Act;

(iii) supplemental security income benefits provided under title XVI of the Social Security Act, and federally administered supplementary payments of the type described in section 1616(a) of such Act (including payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66);

(iv) any benefits provided under a State plan approved under title I, X, XIV, or XVI of the Social Security Act (as those titles apply to Puerto Rico, Guam, and the Virgin Islands);

(v) unemployment compensation provided under a State law described in section 3304 of this title;

(vi) assistance provided under the Food Stamp Act of 1977;

(vii) State-administered supplementary payments of the type described in section

1616(a) of the Social Security Act [42 USCS § 1382e(a)] (including payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66);

(viii)

(I) any needs-based pension provided under chapter 15 of title 38, United States Code, or under any other law administered by the Secretary of Veterans Affairs;

(II) parents' dependency and indemnity compensation provided under section 1315 of title 38, United States Code;

(III) health-care services furnished under section 1710(a)(1)(I), 1710(a)(2), 1710(b), and 1712(a)(2)(B) of such title; and

(IV) compensation paid under chapter 11 of title 38, United States Code, at the 100 percent rate based solely on unemployability and without regard to the fact that the disability or disabilities are not rated as 100 percent disabling under the rating schedule; and

(ix) any housing assistance program administered by the Department of Housing and Urban Development that involves initial and periodic review of an applicant's or participant's income, except that return information may be disclosed under this clause only on written request by the Secretary of Housing and Urban Development and only for use by officers

and employees of the Department of Housing and Urban Development with respect to applicants for and participants in such programs.

Only return information from returns with respect to net earnings from self-employment and wages may be disclosed under this paragraph for use with respect to any program described in clause (viii)(IV). Clause (viii) shall not apply after September 30, 1998. Clause (ix) shall not apply after September 30, 1998.

(8) **Disclosure of certain return information by Social Security Administration to State and local child support enforcement agencies.** (A) In general. Upon written request, the Commissioner of Social Security shall disclose directly to officers and employees of a State or local child support enforcement agency return information from returns with respect to social security account numbers, net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5) of this subsection.

(B) Restriction on disclosure. The Commissioner of Social Security shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations. For purposes of the preceding sentence, the term "child support obligations" only includes obligations which are being enforced pursuant to a plan described in section 454 of the Social Security Act which

has been approved by the Secretary of Health and Human Services under part D of title IV of such Act.

(C) State or local child support enforcement agency. For purposes of this paragraph, the term "State or local child support enforcement agency" means any agency of a State or political subdivision thereof operating pursuant to a plan described in subparagraph (B).

(9) **Disclosure of alcohol fuel producers to administrators of State alcohol laws.** Notwithstanding any other provision of this section, the Secretary may disclose –

(A) the name and address of any person who is qualified to produce alcohol for fuel use under section 5181, and

(B) the location of any premises to be used by such person in producing alcohol for fuel,

to any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for administration of State alcohol laws solely for use in the administration of such laws.

(10) **Disclosure of certain information to agencies requesting a reduction under section 6402(c) or 6402(d).** (A) Return information from Internal Revenue Service. The Secretary may, upon receiving a written request, disclose to officers and employees of any agency seeking a reduction under subsection (c) or (d) of section 6402 and to officers and employees of the Department of the Treasury in connection with such reduction –

(i) taxpayer identity information with respect to the taxpayer against whom

such a reduction was made or not made and with respect to any other person filing a joint return with such taxpayer,

(ii) the fact that a reduction has been made or has not been made under such subsection with respect to such taxpayer,

(iii) the amount of such reduction,

(iv) whether such taxpayer filed a joint return, and

(v) the fact that a payment was made (and the amount of the payment) to the spouse of the taxpayer on the basis of a joint return.

(B) Restriction on use of disclosed information. Any officers and employees of an agency receiving return information under subparagraph (A) shall use such information only for the purposes of, and to the extent necessary in, establishing appropriate agency records, locating any person with respect to whom a reduction under subsection (c) or (d) of section 6402 is sought for purposes of collecting the debt with respect to which the reduction is sought, or in the defense of any litigation or administrative procedure ensuing from a reduction made under subsection (c) or (d) of section 6402.

(11) **Disclosure of return information to carry out Federal Employees' Retirement System.** (A) In general. The Commissioner of Social Security shall, on written request, disclose to the Office of Personnel Management return information from returns with respect to net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement

income, which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5).

(B) Restriction on disclosure. The Commissioner of Social Security shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, the administration of chapters 83 and 84 of title 5, United States Code.

(12) **Disclosure of certain taxpayer identity information for verification of employment status of medicare beneficiary and spouse of medicare beneficiary.** (A) Return information from Internal Revenue Service. The Secretary shall, upon written request from the Commissioner of Social Security, disclose to the Commissioner available filing status and taxpayer identity information from the individual master files of the Internal Revenue Service relating to whether any medicare beneficiary identified by the Commissioner was a married individual (as defined in section 7703) for any specified year after 1986, and, if so, the name of the spouse of such individual and such spouse's TIN.

(B) Return information from Social Security Administration. The Commissioner of Social Security shall, upon written request from the Administrator of the Health Care Financing Administration, disclose to the Administrator the following information:

(i) The name and TIN of each medicare beneficiary who is identified as having received wages (as defined in section 3401(a)), above an amount (if any) specified by the Secretary of Health and Human Services, from a qualified employer in a previous year.

(ii) For each medicare beneficiary who was identified as married under subparagraph (A) and whose spouse is identified as having received wages, above an amount (if any) specified by the Secretary of Health and Human Services, from a qualified employer in a previous year –

(I) the name and TIN of the medicare beneficiary, and

(II) the name and TIN of the spouse.

(iii) With respect to each such qualified employer, the name, address, and TIN of the employer and the number of individuals with respect to whom written statements were furnished under section 6051 by the employer with respect to such previous year.

(C) Disclosure by Health Care Financing Administration. With respect to the information disclosed under subparagraph (B), the Administrator of the Health Care Financing Administration may disclose –

(i) to the qualified employer referred to in such subparagraph the name and TIN of each individual identified under such subparagraph as having received wages from the employer (hereinafter in this subparagraph referred to as the "employee") for purposes of determining during what period such employee or the employee's spouse may be (or have been) covered under a group health plan of the employer and what benefits are or were covered under the plan (including the

name, address, and identifying number of the plan),

(ii) to any group health plan which provides or provided coverage to such an employee or spouse, the name of such employee and the employee's spouse (if the spouse is a medicare beneficiary) and the name and address of the employer, and, for the purpose of presenting a claim to the plan –

(I) the TIN of such employee if benefits were paid under title XVIII of the Social Security Act with respect to the employee during a period in which the plan was a primary plan (as defined in section 1862(b)(2)(A) of the Social Security Act), and

(II) the TIN of such spouse if benefits were paid under such title with respect to the spouse during such period, and

(iii) to any agent of such Administrator the information referred to in subparagraph (B) for purposes of carrying out clauses (i) and (ii) on behalf of such Administrator.

(D) Special rules. –

(i) Restrictions on disclosure. Information may be disclosed under this paragraph only for purposes of, and to the extent necessary in, determining the extent to which any medicare beneficiary is covered under any group health plan.

(ii) Timely response to requests. Any request made under subparagraph (A) or (B) shall be complied with as soon as possible but in no event later than 120 days after the date the request was made.

(E) Definitions. For purposes of this paragraph –

(i) Medicare beneficiary. The term "medicare beneficiary" means an individual entitled to benefits under part A, or enrolled under part B, of title XVIII of the Social Security Act, but does not include such an individual enrolled in part A under section 1818.

(ii) Group health plan. The term "group health plan" means any group health plan (as defined in section 5000(b)(1)).

(iii) Qualified employer. The term "qualified employer" means, for a calendar year, an employer which has furnished written statements under section 6051 with respect to at least 20 individuals for wages paid in the year.

(F) Termination. Subparagraphs (A) and (B) shall not apply to –

(i) any request made after September 30, 1998, and

(ii) any request made before such date for information relating to –

(I) 1997 or thereafter in the case of subparagraph (A), or

(II) 1998 or thereafter in the case of subparagraph (B).

(13) Disclosure of return information to carry out income contingent repayment of student loans. (A) In general. The Secretary may, upon written request from the Secretary of Education, disclose to officers and employees of the Department of Education return information with respect to a taxpayer who has received an applicable student loan and whose loan repayment amounts are based in whole or in part on the taxpayer's income. Such return information shall be limited to –

(i) taxpayer identity information with respect to such taxpayer,

(ii) the filing status of such taxpayer, and

(iii) the adjusted gross income of such taxpayer.

(B) Restriction on use of disclosed information. Return information disclosed under subparagraph (A) may be used by officers and employees of the Department of Education only for the purposes of, and to the extent necessary in, establishing the appropriate income contingent repayment amount for an applicable student loan.

(C) Applicable student loan. For purposes of this paragraph, the term "applicable student loan" means –

(i) any loan made under the program authorized under part D of title IV of the Higher Education Act of 1965 [20 USCS §§ 1087a et seq.], and

(ii) any loan made under part B or E of title IV of the Higher Education Act of 1965 [20 USCS §§ 1071 et seq. or 1087ee et

seq.] which is in default and has been assigned to the Department of Education.

(D) Termination. This paragraph shall not apply to any request made after September 30, 1998.

(14) Disclosure of return information to United States Customs Service. The Secretary may, upon written request from the Commissioner of the United States Customs Service, disclose to officers and employees of the Department of the Treasury such return information with respect to taxes imposed by chapters 1 and 6 as the Secretary may prescribe by regulations, solely for the purpose of, and only to the extent necessary in –

(A) ascertaining the correctness of any entry in audits as provided for in section 509 of the Tariff Act of 1930 (19 U.S.C. 1509), or

(B) other actions to recover any loss of revenue, or to collect duties, taxes, and fees, determined to be due and owing pursuant to such audits.

(15) Disclosure of returns filed under section 6050I. The Secretary may, upon written request, disclose to officers and employees of –

(A) any Federal agency,

(B) any agency of a State or local government, or

(C) any agency of the government of a foreign country, information contained on returns filed under section 6050I. Any such disclosure shall be made on the same basis, and subject to the same conditions, as apply to disclosures of information on reports filed under section

5313 of title 31, United States Code; except that no disclosure under this paragraph shall be made for purposes of the administration of any tax law.

(m) **Disclosure of taxpayer identity information.** (1) **Tax refunds.** The Secretary may disclose taxpayer identity information to the press and other media for purposes of notifying persons entitled to tax refunds when the Secretary, after reasonable effort and lapse of time, has been unable to locate such persons.

(2) **Federal claims.** (A) In general. Except as provided in subparagraph (B), the Secretary may, upon written request, disclose the mailing address of a taxpayer for use by officers, employees, or agents of a Federal agency for purposes of locating such taxpayer to collect or compromise a Federal claim against the taxpayer in accordance with sections 3711, 3717, and 3718 of title 31.

(B) Special rule for consumer reporting agency. In the case of an agent of a Federal agency which is a consumer reporting agency (within the meaning of section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))), the mailing address of a taxpayer may be disclosed to such agent under subparagraph (A) only for the purpose of allowing such agent to prepare a commercial credit report on the taxpayer for use by such Federal agency in accordance with sections 3711, 3717, and 3718 of title 31.

(3) **National Institute for Occupational Safety and Health.** Upon written request, the Secretary may disclose the mailing address of taxpayers to officers and employees of the National Institute for

Occupational Safety and Health solely for the purpose of locating individuals who are, or may have been, exposed to occupational hazards in order to determine the status of their health or to inform them of the possible need for medical care and treatment.

(4) **Individuals who owe an overpayment of Federal Pell grants or who have defaulted on student loans administered by the Department of Education.** (A) Upon written request by the Secretary of Education, the Secretary may disclose the mailing address of any taxpayer –

> (i) who owes an overpayment of a grant awarded to such taxpayer under subpart 1 of part A of title IV of the Higher Education Act of 1965 [20 USCS §§ 1070a set [sic] seq.], or
>
> (ii) who has defaulted on a loan –
>
> > (I) made under part B, D, or E of title IV of the Higher Education Act of 1965 [20 USCS §§ 1071 et seq., 1987a et seq., or 1087ee et seq.], or
> >
> > (II) made pursuant to section 3(a)(1) of the Migration and Refugee Assistance Act of 1962 [22 USCS § 2602(a)(1)] to a student at an institution of higher education,
>
> for use only by officers, employees, or agents of the Department of Education for purposes of locating such taxpayer for purposes of collecting such overpayment or loan.

(B) Disclosure to educational institutions, etc. Any mailing address disclosed under subparagraph (A)(i) may be disclosed by the Secretary of Education to –

(i) any lender, or any State or nonprofit guarantee agency, which is participating under part B or D of title IV of the Higher Education Act of 1965 [20 USCS §§ 1071 et seq. or 1987a et seq.], or

(ii) any educational institution with which the Secretary of Education has an agreement under subpart 1 of part A, or part D or E, of title IV of such Act [20 USCS §§ 1070a et seq., or 1987a et seq. or 1987ee et seq.],

for use only by officers, employees, or agents of such lender, guarantee agency, or institution whose duties relate to the collection of student loans for purposes of locating individuals who have defaulted on student loans made under such loan programs for purposes of collecting such loans.

(5) **Individuals who have defaulted on student loans administered by the Department of Health and Human Services.** (A) In general. Upon written request by the Secretary of Health and Human Services, the Secretary may disclose the mailing address of any taxpayer who has defaulted on a loan made under part C of title VII of the Public Health Service Act or under subpart II of part B of title VIII of such Act, for use only by officers, employees, or agents of the Department of Health and Human Services for purposes of locating such taxpayer for purposes of collecting such loan.

Any mailing address disclosed under subparagraph (A) may be disclosed by the Secretary of Health and Human Services to –

(i) any school with which the Secretary of Health and Human Services has an agreement under subpart II of part C of title VII of the Public Health Service Act or subpart II of part B of title VIII of such Act, or

(ii) any eligible lender (within the meaning of section 737(4) of such Act) participating under subpart I of part C of title VII of such Act, for use only by officers, employees, or agents of such school or eligible lender whose duties relate to the collection of student loans for purposes of locating individuals who have defaulted on student loans made under such subparts for the purposes of collecting such loans.

(6) **Blood Donor Locator Service**. (A) In general. Upon written request pursuant to section 1141 of the Social Security Act, the Secretary shall disclose the mailing address of taxpayers to officers and employees of the Blood Donor Locator Service in the Department of Health and Human Services.

(B) Restriction on disclosure. The Secretary shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, assisting under the Blood Donor Locator Service authorized persons (as

defined in section 1141(h)(1) of the Social Security Act) in locating blood donors who, as indicated by donated blood or products derived therefrom or by the history of the subsequent use of such blood or blood products, have or may have the virus for acquired immune deficiency syndrome, in order to inform such donors of the possible need for medical care and treatment.

(C) Safeguards. The Secretary shall destroy all related blood donor records (as defined in section 1141(h)(2) of the Social Security Act) in the possession of the Department of the Treasury upon completion of their use in making the disclosure required under subparagraph (A), so as to make such records undisclosable.

(7) **Social security account statement furnished by Social Security Administration**. Upon written request by the Commissioner of Social Security, the Secretary may disclose the mailing address of any taxpayer who is entitled to receive a social security account statement pursuant to section 1143(c) of the Social Security Act, for use only by officers, employees or agents of the Social Security Administration for purposes of mailing such statement to such taxpayer.

(n) **Certain other persons**. Pursuant to regulations prescribed by the Secretary, returns and return information may be disclosed to any person, including any person described in section 7513(a), to the extent necessary in connection with the processing, storage, transmission,

and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, and the providing of other services, for purposes of tax administration.

(o) **Disclosure of returns and return information with respect to certain taxes. (1) Taxes imposed by subtitle E.** Returns and return information with respect to taxes imposed by subtitle E (relating to taxes on alcohol, tobacco, and firearms) shall be open to inspection by or disclosure to officers and employees of a Federal agency whose official duties require such inspection or disclosure.

(2) Taxes imposed by chapter 35. Returns and return information with respect to taxes imposed by chapter 35 (relating to taxes on wagering) shall, notwithstanding any other provision of this section, be open to inspection by or disclosure only to such person or persons and for such purpose or purposes as are prescribed by section 4424.

(p) **Procedure and recordkeeping. (1) Manner, time, and place of inspections.** Requests for the inspection or disclosure of a return or return information and such inspection or disclosure shall be made in such manner and at such time and place as shall be prescribed by the Secretary.

(2) Procedure. (A) Reproduction of returns. A reproduction or certified reproduction of a return shall, upon written request, be furnished to any person to whom disclosure or inspection of such return is authorized under this section.

A reasonable fee may be prescribed for furnishing such reproduction or certified reproduction.

(B) Disclosure of return information. Return information disclosed to any person under the provisions of this title may be provided in the form of written documents, reproductions of such documents, films or photoimpressions, or electronically produced tapes, disks, or records, or by any other mode or means which the Secretary determines necessary or appropriate. A reasonable fee may be prescribed for furnishing such return information.

(C) Use of reproductions. Any reproduction of any return, document, or other matter made in accordance with this paragraph shall have the same legal status as the original, and any such reproduction shall, if properly authenticated, be admissible in evidence in any judicial or administrative proceeding as if it were the original, whether or not the original is in existence.

(3) **Records of inspection and disclosure.** (A) System of recordkeeping. Except as otherwise provided by this paragraph, the Secretary shall maintain a permanent system of standardized records or accountings of all requests for inspection or disclosure of returns and return information (including the reasons for and dates of such requests) and of returns and return information inspected or disclosed under this section. Notwithstanding the provisions of section 552a(c) of title 5, United States

Code, the Secretary shall not be required to maintain a record or accounting of requests for inspection or disclosure of returns and return information, or of returns and return information inspected or disclosed, under the authority of subsections (c), (e), (h)(1), (3)(A), or (4), (i)(4), or (7)(A)(ii), (k)(1), (2), or (6), (l)(1), (4)(B), (5), (7), (8), (9), (10), (11), (12), (13), (14), or (15), (m), or (n). The records or accountings required to be maintained under this paragraph shall be available for examination by the Joint Committee on Taxation or the Chief of Staff of such joint committee. Such record or accounting shall also be available for examination by such person or persons as may be, but only to the extent, authorized to make such examination under section 552a(c)(3) of title 5, United States Code.

(B) Report by the Secretary. The Secretary shall, within 90 days after the close of each calendar year, furnish to the Joint Committee on Taxation a report with respect to, or summary of, the records or accountings described in subparagraph (A) in such form and containing such information as such joint committee or the Chief of Staff of such joint committee may designate. Such report or summary shall not, however, include a record or accounting of any request by the President under subsection (g) for, or the disclosure in response to such request of, any return or return information with respect to any individual who, at the time

of such request, was an officer or employee of the executive branch of the Federal Government. Such report or summary, or any part thereof, may be disclosed by such joint committee to such persons and for such purposes as the joint committee may, by record vote of a majority of the members of the joint committee, determine.

(C) Public report on disclosures. The Secretary shall, within 90 days after the close of each calendar year, furnish to the Joint Committee on Taxation for disclosure to the public a report with respect to the records or accountings described in subparagraph (A) which –

(i) provides with respect to each Federal agency, each agency, body, or commission described in subsection (d), (i)(3)(B)(i), or (l)(6), and the General Accounting Office the number of –

(I) requests for disclosure of returns and return information,

(II) instances in which returns and return information were disclosed pursuant to such requests or otherwise,

(III) taxpayers whose returns, or return information with respect to whom, were disclosed pursuant to such requests, and

(ii) describes the general purposes for which such requests were made,

(4) **Safeguards**. Any Federal agency described in subsection (h)(2), (h)(6), (i)(1), (2), (3), or (5), (j)(1) or (2), (l)(1), (2), (3), (5), (10), (11), (13), or (14), or (o)(1), the General Accounting Office, or any agency, body, or commission described in subsection (d), (i)(3)(B)(i), or (l), (6), (7), (8), (9), or (12) shall, as a condition for receiving returns or return information –

(A) establish and maintain, to the satisfaction of the Secretary, a permanent system of standardized records with respect to any request, the reason for such request, and the date of such request made by or of it and any disclosure of return or return information made by or to it;

(B) establish and maintain, to the satisfaction of the Secretary, a secure area or place in which such returns or return information shall be stored;

(C) restrict, to the satisfaction of the Secretary, access to the returns or return information only to persons whose duties or responsibilities require access and to whom disclosure may be made under the provisions of this title;

(D) provide such other safeguards which the Secretary determines (and which he prescribes in regulations) to be necessary or appropriate to

protect the confidentiality of the returns or return information;

(E) furnish a report to the Secretary, at such time and containing such information as the Secretary may prescribe, which describes the procedures established and utilized by such agency, body, or commission or the General Accounting Office for ensuring the confidentiality of returns and return information required by this paragraph; and

(F) upon completion of use of such returns or return information –

(i) in the case of an agency, body, or commission described in subsection (d), (i)(3)(B)(i), or (l)(6), (7), (8), or (9), return to the Secretary such returns or return information (along with any copies made therefrom) or make such returns or return information undisclosable in any manner and furnish a written report to the Secretary describing such manner,

(ii) in the case of an agency described in subsections (h)(2), (h)(6), (i)(1), (2), (3), or (5), (j)(1) or (2), (l)(1), (2), (3), (5), (10), (11), (12), (13), (14) or (15) or (o)(1), or the General Accounting Office, either –

(I) return to the Secretary such returns or return information (along with any copies made therefrom),

(II) otherwise make such returns or return information undisclosable, or

(III) to the extent not so returned or made undisclosable, ensure that the conditions of subparagraphs (A), (B), (C), (D), and (E) of this paragraph continue to be met with respect to such returns or return information, and

(iii) in the case of the Department of Health and Human Services for purposes of subsection (m)(6), destroy all such return information upon completion of its use in providing the notification for which the information was obtained, so as to make such information undisclosable;

except that the conditions of subparagraphs (A), (B), (C), (D), and (E) shall cease to apply with respect to any return or return information if, and to the extent that, such return or return information is disclosed in the course of any judicial or administrative proceeding and made a part of the public record thereof. If the Secretary determines that any such agency, body, or commission or the General Accounting Office has failed to, or does not, meet the requirements of this paragraph, he may, after any proceedings for review established under paragraph (7), take such actions as are necessary to ensure such requirements are met, including refusing to disclose returns or return information to such agency, body, or commission or the General

Accounting Office until he determines that such requirements have been or will be met. In the case of any agency which receives any mailing address under paragraph (2), (4), (6), or (7) of subsection (m) and which discloses any such mailing address to any agent or which receives any information under subsection (l)(12)(B) and which discloses any such information to any agent, this paragraph shall apply to such agency and each such agent (except that, in the case of an agent, any report to the Secretary or other action with respect to the Secretary shall be made or taken through such agency). For purposes of applying this paragraph in any case to which subsection (m)(6) applies, the term "return information" includes related blood donor records (as defined in section 1141(h)(2) of the Social Security Act).

(5) **Report on procedures and safeguards**. After the close of each calendar year, the Secretary shall furnish to each committee described in subsection (f)(1) a report which describes the procedures and safeguards established and utilized by such agencies, bodies, or commissions and the General Accounting Office for ensuring the confidentiality of returns and return information as required by this subsection. Such report shall also describe instances of deficiencies in, and failure to establish or utilize, such procedures.

(6) **Audit of procedures and safeguards**. (A) Audit by Comptroller General. The Comptroller General may audit the procedures and safeguards established by such agencies, bodies, or commissions pursuant to this subsection to determine whether such

safeguards and procedures meet the requirements of this subsection and ensure the confidentiality of returns and return information. The Comptroller General shall notify the Secretary before any such audit is conducted.

(B) Records of inspection and reports by the Comptroller General. The Comptroller General shall –

(i) maintain a permanent system of standardized records and accountings of returns and return information inspected by officers and employees of the General Accounting Office under subsection (i)(7)(A)(ii) and shall, within 90 days after the close of each calendar year, furnish to the Secretary a report with respect to, or summary of, such records or accountings in such form and containing such information as the Secretary may prescribe, and

(ii) furnish an annual report to each committee described in subsection (f) and to the Secretary setting forth his findings with respect to any audit conducted pursuant to subparagraph (A).

The Secretary may disclose to the Joint Committee any report furnished to him under clause (i).

(7) **Administrative review**. The Secretary shall by regulations prescribe procedures which provide for administrative review of any determination under paragraph (4) that any agency, body, or commission

described in subsection (d) has failed to meet the requirements of such paragraph.

(8) **State law requirements**. (A) Safeguards. Notwithstanding any other provision of this section, no return or return information shall be disclosed after December 31, 1978, to any officer or employee of any State which requires a taxpayer to attach to, or include in, any State tax return a copy of any portion of his Federal return, or information reflected on such Federal return, unless such State adopts provisions of law which protect the confidentiality of the copy of the Federal return (or portion thereof) attached to, or the Federal return information reflected on, such State tax return.

(B) Disclosure of returns or return information in State returns. Nothing in subparagraph (A) shall be construed to prohibit the disclosure by an officer or employee of any State of any copy of any portion of a Federal return or any information on a Federal return which is required to be attached or included in a State return to another officer or employee of such State (or political subdivision of such State) if such disclosure is specifically authorized by State law.

(q) **Regulations**. The Secretary is authorized to prescribe such other regulations as are necessary to carry out the provisions of this section.

Title 26 of the United States Code, section 7430, provides:

§ 7430. Awarding of costs and certain fees.

(a) **In general.** In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for –

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(b) **Limitations. (1) Requirement that administrative remedies be exhausted.** A judgment for reasonable litigation costs shall not be awarded under subsection (a) in any court proceeding unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service. Any failure to agree to an extension of the time for the assessment of any tax shall not be taken into account for purposes of determining whether the prevailing party meets the requirements of the preceding sentence.

(2) Only costs allocable to the United States. An award under subsection (a) shall be made only for reasonable litigation and administrative costs which are allocable to the United States and not to any other party.

(3) Costs denied where party prevailing protracts proceedings. No award for reasonable litigation and

administrative costs may be made under subsection (a) with respect to any portion of the administrative or court proceeding during which the prevailing party has unreasonably protracted such proceeding.

(4) [Redesignated]

(c) **Definitions.** For purposes of this section –

(1) **Reasonable litigation costs.** The term "reasonable litigation costs" includes –

(A) reasonable court costs, and

(B) based upon prevailing market rates for the kind or quality of services furnished –

(i) the reasonable expenses of expert witnesses in connection with a court proceeding, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States,

(ii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and

(iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of $110 per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for such proceeding, justifies a higher rate.

In the case of any calendar year beginning after 1996, the dollar amount referred to in clause (iii) shall be increased by an amount equal to such dollar

amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) for such calendar year, by substituting "calendar year 1995" for "calendar year 1992" in subparagraph (B) thereof. If any dollar amount after being increased under the preceding sentence is not a multiple of $10, such dollar amount shall be rounded to the nearest multiple of $10.

(2) **Reasonable administrative costs.** The term "reasonable administrative costs" means –

(A) any administrative fees or similar charges imposed by the Internal Revenue Service, and

(B) expenses, costs, and fees described in paragraph (1)(B), except that any determination made by the court under clause (ii) or (iii) thereof shall be made by the Internal Revenue Service in cases where the determination under paragraph (4)(C) of the awarding of reasonable administrative costs is made by the Internal Revenue Service.

Such term shall only include costs incurred on or after the earlier of (i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or (ii) the date of the notice of deficiency.

(3) **Attorney's fees.** For purposes of paragraphs (1) and (2), fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court or before the Internal Revenue Service shall be treated as fees for the services of an attorney.

(4) **Prevailing party.** (A) In general. The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved) –

(i) which –

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

(iii) [Redesignated]

(B) Exception if United States establishes that its position was substantially justified.

(i) General rule. A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applies if the United States establishes that the position of the United States in the proceeding was substantially justified.

(ii) Presumption of no justification if Internal Revenue Service did not follow certain published guidance. For purposes of clause (i), the position of the United States shall be presumed not to be substantially justified if the Internal Revenue Service did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(iii) Applicable published guidance. For purposes of clause (ii), the term "applicable published guidance" means –

(I) regulations, revenue rulings, revenue procedures, information releases, notices, and announcements, and

(II) any of the following which are issued to the taxpayer: private letter rulings, technical advice memoranda, and determination letters.

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or –

(i) in the case where the final determination with respect to the tax, interest, or penalty is made at the administrative level, by the Internal Revenue Service, or

(ii) in the case where such final determination is made by a court, the court.

(5) **Administrative proceedings.** The term "administrative proceeding" means any procedure or other action before the Internal Revenue Service.

(6) **Court proceedings.** The term "court proceeding" means any civil action brought in a court of the United States (including the Tax Court and the United States Claims Court).

(7) **Position of United States.** The term "position of the United States" means –

(A) the position taken by the United States in a judicial proceeding to which subsection (a) applies, and

(B) the position taken in an administrative proceeding to which subsection (a) applies as of the earlier of –

(i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or

(ii) the date of the notice of deficiency.

(d) **Special rules for payment of costs. (1) Reasonable administrative costs.** An award for reasonable administrative costs shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(2) **Reasonable litigation costs.** An award for reasonable litigation costs shall be payable in the case of the Tax Court in the same manner as such an award by a district court.

(e) **Multiple actions.** For purposes of this section, in the case of –

(1) multiple actions which could have been joined or consolidated, or

(2) a case or cases involving a return or returns of the same taxpayer (including joint returns of married individuals) which could have been joined in a single court proceeding in the same court,

such actions or cases shall be treated as 1 court proceeding regardless of whether such joinder or consolidation actually occurs, unless the court in which such action is brought determines, in its discretion, that it would be inappropriate to treat such actions or cases as joined or consolidated.

(f) **Right of appeal. (1) Court proceedings.** An order granting or denying (in whole or in part) an award

for reasonable litigation or administrative costs under subsection (a) in a court proceeding, may be incorporated as a part of the decision or judgment in the court proceeding and shall be subject to appeal in the same manner as the decision or judgment.

(2) **Administrative proceedings.** A decision granting or denying (in whole or in part) an award for reasonable administrative costs under subsection (a) by the Internal Revenue Service shall be subject to appeal to the Tax Court under rules similar to the rules under section 7463 (without regard to the amount in dispute).

Title 26 of the United States Code, section 7431, provides:

§ 7431. Civil damages for unauthorized disclosure of returns and return information.

(a) **In General. (1) Disclosure by employee of United States.** If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) **Disclosure by a person who is not an employee of United States.** If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages

against such person in a district court of the United States.

(b) **No liability for good faith but erroneous interpretation.** No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

(c) **Damages.** In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of –

(1) the greater of –

(A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of –

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action.

(d) **Period for bringing action.** Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure.

(e) Return; return information. For purposes of this section, the terms "return" and "return information" have the respective meanings given such terms in section 6103(b).

(f) Extension to information obtained under section 3406. For purposes of this section –

(1) any information obtained under section 3406 (including information with respect to any payee certification failure under subsection (d) thereof) shall be treated as return information, and

(2) any use of such information other than for purposes of meeting any requirement under section 3406 or (subject to the safeguards set forth in section 6103) for purposes permitted under section 6103 shall be treated as a violation of section 6103.

For purposes of subsection (b), the reference to section 6103 shall be treated as including a reference to section 3406.

Title 42 of the United States Code, section 1983, provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42 of the United States Code, section 1985(3), provides:

§ 1985. Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a

legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

California Code of Civil Procedure sections 335 and 340(3) together provide:

§335. Introduction.

The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

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§ 340. One year

Within one year:

(3) Libel, slander, assault, battery, false imprisonment, seduction, injury or death from wrongful act or neglect, forged or raised checks, injury to animals by feeder or veterinarian. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.

California Code of Civil Procedure sections 335 and 343 together provide:

§335. Introduction.

The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

§343. Four Years – Actions Not Provided for in Foregoing.

An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

California Government Code section 945.3 provides:

§ 945.3. Person charged with criminal offense; prohibition from bringing civil action for money or damages while charges pending; tolling of statute of limitations

No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a justice, municipal, or superior court.

Any applicable statute of limitations for filing and prosecuting these actions shall be tolled during the period that the charges are pending before a justice, municipal, or superior court.

For the purposes of this section, charges pending before a justice, municipal, or superior court do not

include appeals or criminal proceedings diverted pursuant to Chapter 2.5 (commencing with Section 1000), Chapter 2.6 (commencing with Section 1000.6), Chapter 2.7 (commencing with Section 1001), Chapter 2.8 (commencing with Section 1001.20), or Chapter 2.9 (commencing with Section 1001.50) of Title 6 of Part 2 of the Penal Code.

Nothing in this section shall prohibit the filing of a claim with the board of a public entity, and this section shall not extend the time within which a claim is required to be presented pursuant to Section 911.2.

California Penal Code section 830.8(a) provides:

§ 830.8. Federal employees

(a) Federal criminal investigators and law enforcement officers are not California peace officers, but may exercise the powers of arrest of a peace officer in any of the following circumstances:

(1) Any circumstances specified in Section 836 or Section 5150 of the Welfare and Institutions Code for violations of state or local laws.

(2) When these investigators and law enforcement officers are engaged in the enforcement of federal criminal laws and exercise the arrest powers only incidental to the performance of these duties.

(3) When requested by a California law enforcement agency to be involved in a joint task force or criminal investigation.

(4) When probable cause exists to believe there is any public offense that involves immediate danger to persons or property.

In all of these instances, the provisions of Section 847 shall apply. These investigators and law enforcement officers, prior to the exercise of these arrest powers, shall have been certified by their agency heads as having satisfied the training requirements of Section 832, or the equivalent thereof.

This subdivision does not apply to federal officers of the Bureau of Land Management. These officers have no authority to enforce California statutes without the written consent of the sheriff or the chief of police in whose jurisdiction they are assigned.

Supreme Court, U.S.
FILED
JUN 18 1997
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(2)

No. 96-1661

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCOR CAPITAL CORPORATION, ET AL., PETITIONERS

v.

WILBUR GOOLKASIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the *Bivens* claims brought against the individual federal officers in this case are barred by the statute of limitations.

2. Whether the claim that the United States made an unauthorized disclosure of tax return information in violation of 26 U.S.C. 6103 is barred by the statute of limitations.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1661

AMCOR CAPITAL CORPORATION, ET AL., PETITIONERS

v.

WILBUR GOOLKASIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order issued by the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 106 F.3d 406 (Table). The opinions of the district court (Pet. App. 3-13, 14-35) are unreported.

JURISDICTION

The order of the court of appeals was entered on January 15, 1997. The petition for a writ of certiorari was filed on April 15, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are set forth at Pet. App. 36-118.

STATEMENT

1. a. On October 12, 1994, petitioners Amcor Capital Corporation, Fred H. Behrens, and Robert A. Wright filed a complaint based on *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), seeking an award of damages against twenty present and former federal employees for alleged violations of constitutional rights (Pet. App. 14-15).[1] On January 3, 1995, petitioners filed an amended complaint that added as defendants the United States and a twenty-first federal employee. The amended complaint also added additional causes of action for conspiracy, invasion of privacy and unlawful disclosure of tax return information (*id.* at 15).

The amended complaint alleged that Amcor was formed to raise venture capital for the agricultural industry and that the defendants had conspired to destroy Amcor in order to maximize tax assessments, interest and penalties (CR 3 at 2).[2] The conspiracy allegedly included baseless criminal investigations and civil tax audits, the wrongful disclosure of confidential tax return information, illegal telephone

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[1] In the complaint, Behrens and Wright brought suit both in their individual capacities and as general partners "for certain listed AMCOR limited partnerships" (CR 3 at 1). The complaint contains a list of the names of the limited partnerships (CR 3, Exh. A) but does not identify the partners.

[2] "CR" refers to the docket control numbers assigned to the documents in the original record by the clerk of the district court.

wiretaps and videotapes, grand jury secrecy violations, invasion of Amcor's attorney-client privileges, misrepresentations to representatives of Congress and to the Tax Court, and a scheme to cover up the alleged violations (*id.* at 3-4).

The United States and the twenty-one federal employees filed separate motions to dismiss or for summary judgment (Pet. App. 4, 16). Among the several defenses asserted, the defendants urged that all of the asserted claims for relief were barred by the applicable statutes of limitations (*ibid.*).[3] In support of that contention, the defendants submitted internal memoranda and letters written by Amcor showing that Amcor had knowledge of the actions recited in the complaint more than two years prior to commencement of suit (*id.* at 8, 12, 26-27, 31).

In opposing this motion, Amcor submitted declarations that purported to establish that Amcor did not know of the facts on which the complaint was based prior to 1994, the year in which the complaint was filed (CR 40). Amcor also argued that the statute of limitations was tolled by (i) ongoing settlement discussions with the government; (ii) the government's refusal to produce documents and evidence to Amcor; (iii) the government's fraudulent concealment of facts; (iv) Amcor's attempts to exhaust administrative remedies; and (v) continuing unlawful actions of the defendants (Pet. App. 26 n.1). Amcor sought to conduct discovery to obtain evidence in support of its theories.

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[3] Amcor agreed with the United States that the first three claims for relief should be dismissed as to the government because the United States cannot be sued on a *Bivens* claim (Pet. App. 7).

The parties agreed that the two-year statute of limitations in 26 U.S.C. 7431(d) governs the timeliness of petitioners' claim that the government unlawfully disclosed confidential tax return information (Pet. App. 7). The parties disagreed, however, about what statute of limitations governs the *Bivens* claims against the individual federal employees. Amcor urged (*id.* at 22) that its *Bivens* claims were subject to the four-year "catch-all" statute of limitations in Cal. Civ. Proc. Code § 343 (West 1982). The federal employees contended instead that the *Bivens* claims were subject to the one-year personal injury statute of limitations codified in Cal. Civ. Proc. Code § 340(3) (West 1982).

b. The district court agreed with the federal employees that the *Bivens* claims are governed by the California one-year statute of limitations for personal injuries (Pet. App. 22-25). The court explained that this conclusion follows directly from this Court's holding in *Wilson* v. *Garcia*, 471 U.S. 261 (1985), that the state statute of limitations for personal injury actions governs the timeliness of claims against state officers for violations of constitutional rights under 42 U.S.C. 1983. The district court noted that the Second, Sixth, Seventh, and Ninth Circuits have all held that the state personal injury statute of limitations governs both Section 1983 claims and *Bivens* claims (Pet. App. 23-25).

The court further held that "Amcor's own letters and internal memorandum" demonstrate that "Amcor and its principals knew of their alleged claims against the majority of these defendants as early as December 1991 or at the latest by March 16, 1993," and that the action, commenced on October 12, 1994, was therefore time-barred (Pet. App. 26). The court

quoted extensively from the 25-page letter of December 19, 1991, from Behrens's attorney, Roger M. Olsen, which alleged a "pervasive, and willful circumvention and disregard of legal principles and Federal statutes by both the Justice Department and the IRS" (*id.* at 27). The court also noted that Amcor's June 17, 1992, internal memorandum complained of a "*pattern* of blatant Government misconduct" and described Amcor's desire to expose and seek redress for that alleged wrongdoing (*id.* at 31). The court also cited the March 16, 1993, letter from Barry Governman, Amcor's vice-president, to the Honorable Larry A. Compest of the United States House of Representatives, which states that "the events * * * became known to us based, largely, on *sworn testimony* obtained through civil litigation in the U.S. District Court between 1990 and 1993" (*ibid.*; see also *id.* at 8) and that "fiduciary responsibility to our limited partners mandates that a lawsuit be filed against the U.S. Government" (*id.* at 32).

Based on these Amcor documents, the court concluded that, although "Amcor may not have been aware of the identities of all of the Individual Defendants as of June 1992," it "was aware of the aforementioned allegations and the alleged conspiracy by the Government's agents and, or employees by December 1991 or at the latest by June 17, 1992" (Pet. App. 34).[4] The court therefore held the action against the federal employees to be untimely (*ibid.*):

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[4] The court concluded that Amcor was "aware of all of the core facts which support its claims" more than one year prior to commencement of suit and therefore rejected the various tolling arguments that petitioners advanced (Pet. App. 26 n.1).

> If Amcor had not sat on its claims and filed its complaint in a timely fashion, Amcor would have preserved its claims, could have sought discovery to determine the identities of * * * all of the Individual Defendants and sought leave to amend to name any of the Individual Defendants whose identities Amcor was not previously aware. By waiting, Amcor took a calculated risk that its claims against these defendants would be time-barred.

c. The district court similarly determined that Amcor's suit against the United States for unauthorized disclosures of federal tax return information—which was brought on January 3, 1995—is barred by the two-year statute of limitations in 26 U.S.C. 7431(d). The court explained that "Amcor's own letters and internal memoranda indicate that Amcor knew of the core facts which make up its allegations against the Government before January 3, 1993" (Pet. App. 13). The court noted that the Olsen letter of December 19, 1991, complained of the government's alleged violation of taxpayer privacy rules "by illegally conducting administrative civil tax audits and criminal tax investigations with the Department of Agriculture and apparently sharing information about [the] same" (*id.* at 9). The court also pointed out that Amcor's June 17, 1992, memorandum complained of "the impropriety of the thirty-day letters, the fraud contained in those letters * * *, the Government's involvement with the Department of Agriculture and the Government cover-up of the misconduct" (*id.* at 12).

4. In a one-sentence order, the court of appeals affirmed "substantially for the reasons stated" by the district court (Pet. App. 2).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The courts below correctly concluded that the one-year state statute of limitations for personal injury claims (Cal. Civ. Proc. Code § 340(3) (West 1982)) governs the timeliness of *Bivens* claims. In *Wilson* v. *Garcia*, 471 U.S. 261 (1985), this Court held that suits under 42 U.S.C. 1983 are "best characterized as personal injury actions" and that the state statute of limitations on such actions therefore governs such suits. 471 U.S. at 280. The courts of appeals have consistently concluded that the reasons for applying the state statute of limitations on personal injury actions to suits under 42 U.S.C. 1983 apply with equal force to *Bivens* suits and that the personal injury statute of limitations, rather than the "catch-all" statute of limitations, therefore governs *Bivens* suits. See, *e.g.*, *Chin* v. *Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987); *Kurinsky* v. *United States*, 33 F.3d 594, 599 (6th Cir. 1994), cert. denied, 115 S. Ct. 1793 (1995); *Bieneman* v. *City of Chicago*, 864 F.2d 463, 469 (7th Cir. 1988), cert. denied, 490 U.S. 1080 (1989); *Sanchez* v. *United States*, 49 F.3d 1329, 1330 (8th Cir. 1995); *Van Strum* v. *Lawn*, 940 F.2d 406, 408-410 (9th Cir. 1991);[5] *Industrial Constructors Corp.* v.

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[5] In *Gerritsen* v. *Consulado General de Mexico*, 989 F.2d 340, 343, cert. denied, 510 U.S. 828 (1993), the Ninth Circuit—apparently unaware of its then-recent decision in *Van Strum*—

United States Bureau of Reclamation, 15 F.3d 963, 968 (10th Cir. 1994); *Kelly* v. *Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996).

b. Although the statute of limitations for *Bivens* claims is determined by incorporating analogous state law, federal law determines when the claim accrues and when the limitations period begins to run. *Fobbs* v. *Holy Cross Health Systems Corp.*, 29 F.3d 1439, 1444 (9th Cir. 1994), cert. denied, 115 S.Ct. 936 (1995); *Gibson* v. *United States*, 781 F.2d 1334, 1340 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987). Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action. *Bagley* v. *CMC Real Estate Corp.*, 923 F.2d 758, 761-762 (9th Cir. 1991), cert. denied, 502 U.S. 1091 (1992); *Norco Construction, Inc.* v. *King County*, 801 F.2d 1143, 1145 (9th Cir. 1986); *Blanck* v. *McKeen*, 707 F.2d 817, 819-820 (4th Cir. 1983), cert. denied, 464 U.S. 916 (1983).

The district court correctly determined that contemporaneous documents authored by Amcor and its agents established that petitioners were aware of the facts giving rise to this action more than one year

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applied the California four-year catch-all statute of limitations in holding that a *Bivens* action was time-barred. The facts of that case evidently did not require the court to determine whether the one-year statute of limitations applied instead. With the exception of *Gerritsen*, which appears to be an anomaly and contains "no analysis" (Pet. App. 22), the Ninth Circuit has uniformly applied the one-year statute of limitations to *Bivens* suits in cases that arose after this Court's decision in *Wilson* v. *Garcia*, *supra*. See *Van Strum* v. *Lawn*, *supra*; *Matthews* v. *Macanas*, 990 F.2d 467, 468-469 (9th Cir. 1993); *Kreines* v. *United States*, 959 F.2d 834, 836 (9th Cir. 1992). See also pages 11-12, *infra*.

before the suit was commenced.[6] That factual determination, concurred in by both courts below, does not warrant this Court's review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

c. In moving for summary judgment on the statute of limitations issue, the federal employees satisfied

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[6] For example, Amcor alleged that defendant Laurence, in violation of Department of Justice guidelines and statutory requirements, issued non-prosecution letters to certain Texas farmers who grew crops for Amcor partnerships (CR 3 at 6-7, 16-17). The Olsen letter of December 19, 1991, demonstrates Amcor's longstanding knowledge of these alleged violations, for it states that "[t]he immunity having been secured in direct violation of §§ 6103 and 7602(c) of the Code, the agents and Laurence thereby committed a felony" (Pet. App. 30).

Amcor also alleged that defendant Goolkasian violated Amcor's right to counsel and its attorney-client privilege (i) by using as a paid informant Wendell Davies, who was counsel for an immunized witness, and (ii) by monitoring conversations between Davies and his clients (CR 3 at 5-6, 16, 18-19). Mr. Olsen's letter of December 19, 1991, reflects his early knowledge of these allegations, for it objects to (Pet. App. 27-28):

> The violation of the Fifth and Sixth Amendments by the corruption of the attorney-client privilege and relationship by retaining as an undercover paid informant the services of the lawyer for an immunized witness.
>
> * * * The violation of the Fifth and Sixth Amendments by the illegal use of an attorney who, operating as a paid informant, attempted to and successfully did violate the attorney-client privilege of Behrens and others.

The Olsen letter identified Goolkasian as the perpetrator of the alleged violations (*id.* at 28-30). The Olsen letter also demonstrates that Amcor was aware of allegedly illegally-monitored conversations, an allegedly overly-broad search warrant and allegedly punitive partnership tax determinations (CR 33, Exh. 2 at 5, 9, 21).

their burden of demonstrating the absence of a genuine issue of material fact by producing the internal documents of Amcor that revealed petitioners' long-standing awareness of the actions for which they belatedly brought suit. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In response, Amcor failed to come forward with specific facts showing the existence of a genuine issue of material fact. On this record, the district court properly entered summary judgment in favor of the federal employees. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986).

Petitioners err in contending (Pet. 11-12) that there is a conflict among the circuits as to whether summary judgment may be granted on a statute of limitations issue. The cases on which petitioners rely hold only that summary judgment may not be granted when there is a triable issue of fact. See *Maughan* v. *SW Servicing, Inc.*, 758 F.2d 1381, 1388 (10th Cir. 1985) ("We are not convinced that the record, viewed in the light most favorable to the plaintiffs, demonstrates conclusively that plaintiffs knew or should have known of the causal connection between leukemia and the uranium mill tailings in Monticello before August 28, 1978."); *Williams* v. *Borden Inc.*, 637 F.2d 731, 738 (10th Cir. 1980) ("Considering the whole record and the differing inferences reasonably possible * * * , we cannot agree that the record supports a summary judgment dismissing plaintiff's case on limitations grounds."); *Lundy* v. *Union Carbide Corp.*, 695 F.2d 394, 397 (9th Cir. 1982).[7] In this case, as the courts below cor-

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[7] *Aldrich* v. *McCulloch Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980), on which Amcor also relies (Pet. 12), did not

rectly concluded, there is no triable issue of material fact.

Petitioners err in contending (Pet. App. 12) that they had an absolute right to take discovery prior to consideration of the summary judgment motion. Such discovery is discretionary with the trial judge. See Fed. R. Civ. P. 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court * * * may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had."). A trial court's refusal to permit discovery pending a ruling on a motion for summary judgment is reviewable for abuse of discretion. See, *e.g.*, *Qualls* v. *Blue Cross of California*, 22 F.3d 839, 844 (9th Cir. 1994); *Ashton-Tate Corp.* v. *Ross*, 916 F.2d 516, 519 (9th Cir. 1990). It was not an abuse of discretion to require petitioners to address the summary judgment motion before allowing further discovery in this case. The statute of limitations question presented in the motion for summary judgment required a determination of when petitioners became aware of certain past events. That is an issue peculiarly within petitioners' own knowledge. No showing has been made that discovery was needed to inform petitioners of the state of their own past knowledge.

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involve a summary judgment motion, but a dismissal of an amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). In reversing, the appellate court stated that the question whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law. The court, however, did not preclude the determination of this issue on summary judgment, where affidavits, depositions and exhibits could be considered.

d. There is no merit to petitioners' further contention (Pet. 14-16) that evidence of a continuing conspiracy establishes the timeliness of their suit. Even if conspiracy rules were relevant to this case, the action is time-barred. Under federal law, "[i]njury and damage in a civil conspiracy action flow from the overt acts, not from 'the mere continuance of a conspiracy.'" *Gibson* v. *United States*, 781 F.2d at 1340, quoting *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 234 (1st Cir. 1977), quoting *Hoffman* v. *Halden*, 268 F.2d 280, 303 (9th Cir. 1959). Accord, *West* v. *Carson*, 49 F.3d 433, 436 (8th Cir. 1995). The statute of limitations therefore "runs separately from each overt act" alleged to have damaged the plaintiffs, and plaintiffs can recover *only* for overt acts specifically alleged to have occurred within the statutory period. *Gibson* v. *United States*, 781 F.2d at 1340. See also *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 71 (9th Cir.), cert. denied, 444 U.S. 900 (1979). Because the complaint does not allege that any overt act causing damages was committed within the one-year period prior to October 12, 1994, the courts below correctly determined that the suit is barred by the statute of limitations (Pet. App. 26).[8]

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[8] As evidence of its "continuing conspiracy" theory, Amcor seeks to rely (Pet. 15) on (i) the fact that the government opposed certain discovery sought by petitioners in a Tax Court case in the Summer of 1994 and (ii) a letter written by the Internal Revenue Service on October 20, 1993, to various congressmen explaining why petitoners' allegations of governmental misconduct lack any foundation. The "evidence" on which petitioners rely appears to represent, if anything, allegations of "acts of concealment" rather than overt acts causing damage. It is well established in conspiracy law that "acts of concealment," committed after the central object of the

e. Petitioners offer no authority to support their contention (Pet. 16-18) that the statute of limitations should be tolled because of an unresolved intra-circuit conflict in the Ninth Circuit as to the applicable statute of limitations for *Bivens* suits.[9] The intra-circuit conflict that petitioners describe is, in any event, illusory. See note 5, *supra*. For claims that arose after this Court's decision in *Wilson* v. *Garcia*, *supra*, the Ninth Circuit has consistently applied the state statute of limitations for personal injuries in determining the timeliness both of *Bivens* suits and of suits under 42 U.S.C. 1983. See *Van Strum* v. *Lawn*, *supra*; *Matthews* v. *Macanas*, 990 F.2d 467, 468-469 (9th Cir. 1993) (citing *Van Strum*); *Kreines* v. *United States*, 959 F.2d 834, 836 (9th Cir. 1992); *De Anza Properties X, Ltd.* v. *County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991); *McDougal* v. *County of Imperial*, 942 F.2d 668, 672 (9th Cir. 1991); *Harding* v. *Galceran*, 889 F.2d 906-907 (9th Cir. 1989); *Donoghue* v. *Orange County*, 848 F.2d 926, 929-930 n.2 (9th Cir. 1987); *Usher* v. *City of Los Angeles*, 828 F.2d 556, 558 (9th Cir. 1987). The cases cited by Amcor in

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conspiracy has been accomplished, and for the purpose of covering it up, are *not* part of the conspiracy for statute of limitations purposes. *Grunewald* v. *United States*, 353 U.S. 391 (1957); *United States* v. *Finlay*, 55 F.3d 1410, 1415 (9th Cir.), cert. denied, 116 S.Ct. 193 (1995); *Forman* v. *United States*, 259 F.2d 128, modified, 261 F.2d 181 (9th Cir. 1958), aff'd, 361 U.S. 416 (1960); *United States* v. *Lash*, 937 F.2d 1077, 1082 (6th Cir.), cert. denied, 502 U.S. 949 (1991); *United States* v. *Fletcher*, 928 F.2d 495 (2d Cir.), cert. denied, 502 U.S. 815 (1991).

[9] As noted above, other circuits have uniformly held that the state statute of limitations for personal injuries applies to *Bivens* suits. See pages 7-8, *supra*.

which the Ninth Circuit applied the four-year "catch-all" statute of limitations either predated *Wilson* v. *Garcia* (see *Marshall* v. *Kleppe*, 637 F.2d 1217 (9th Cir. 1980)) or involved claims that arose prior to the date of the *Wilson* decision (see *Gibson* v. *United States*, 781 F.2d at 1342 & n.5; *Gerritsen* v. *Consulado General de Mexico*, 989 F.2d 340, 343 (9th Cir.), cert. denied, 510 U.S. 828 1993)).

f. Petitioners further err in contending (Pet. 19-23) that the California doctrine of equitable tolling applies to this case. California permits equitable tolling of the limitations period "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one."[10] *Elkins* v. *Derby*, 115 Cal. Rptr. 641, 644 (1974), quoting *Myers* v. *County of Orange*, 86 Cal. Rptr. 198, 203 (Ct. App. 1970). For equitable tolling to apply in California, the claims in the two actions must be "based on essentially the same set of facts" so that "timely investigation of the first claim should put the defendant in position to appropriately defend the second." *Collier* v. *City of Pasadena*, 191 Cal. Rptr. 681, 686 (Ct. App. 1983).

Petitioners claim that Amcor's petition in Tax Court for review of income tax deficiencies issued by the Commissioner of Internal Revenue tolls the limitations period on their *Bivens* claims seeking damages against the individual federal employees for violations of the Constitution (Pet. 24). The Tax Court suit, however, plainly was not the pursuit of an alternative remedy justifying equitable tolling under

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[10] When, as here, a state statute supplies the applicable statute of limitations, state law, not federal law, supplies the applicable tolling standards. See *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980).

California law, for it involves altogether different claims and different parties. The Tax Court cases adjudicated only the income tax liability of petitioners to the government. Their *Bivens* suit, on the other hand, involves the alleged commission of constitutional torts (not a tax deficiency) and seeks to impose individual liability on federal employees for injuries to the taxpayer. Notice of the Tax Court litigation gave no notice to the federal employees of the present suit. The pendency of the Tax Court litigation therefore did not toll the statute of limitations under California law. See *Aerojet General Corp.* v. *Superior Court*, 223 Cal. Rptr. 249 (Ct. App. 1986) (workmen's compensation claim and suit for fraudulent concealment are different remedies for different wrongs); *Hinton* v. *Pacific Enterprises*, 5 F.3d 391 (9th Cir. 1993), cert. denied, 511 U.S. 1083 (1994) (workmen's compensation claim based on retaliatory discharge did not equitably toll ERISA claim alleging interference with an employee's right to obtain certain plan benefits by compelling her to sign a termination agreement); *Del Percio* v. *Thornsley*, 877 F.2d 785, 786 n.1 (9th Cir. 1989) (no equitable tolling where defendants in the second claim were entirely unrelated to parties in the first claim).[11] The proper

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[11] There is no merit to petitioners' claim (Pet. 24) that seeking congressional "redress" is an alternative remedy that would toll the statute of limitations under California law. Petitioners cite no statute or case in support of their novel "tolling" theory. It is, moreover, highly doubtful that California would adopt such a theory if it were ever presented in the state courts. California, like other States, requires the timely filing of claims to ensure that fair notice is given to the defendants. See, *e.g.*, *Addison* v. *California*, 146 Cal. Rptr. 224 (1978); *Elkins* v. *Derby*, *supra*. Such notice can occur only in

application of California principles of equitable tolling to the facts of this case is, in any event, not an issue that warrants review by this Court.

g. Finally, petitioners err in contending (Pet. 25-28) that Cal. Gov't Code § 945.3 (West 1995) tolls the statute of limitations on the *Bivens* claims. Under Section 945.3, a person charged with a criminal offense cannot bring "a civil action for money or damages against a peace officer * * * relating to the offense for which the accused is charged * * * while the charges against the accused are pending before a justice, municipal, or superior court." No charges "before a justice, municipal, or superior court" were pending against petitioners during the period that the statute of limitations ran on their *Bivens* claims. (See Pet. 28.) This statutory tolling provision is therefore inapplicable to this case.[12]

2. The courts below correctly held that the two-year statute of limitations in 26 U.S.C. 7431(d) bars petitioners' suit against the United States for unau-

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proceedings to which the defendants are themselves made parties; it cannot occur from communications between the plaintiff and third parties.

[12] This statutory tolling provision is inapplicable to this case for an additional, unrelated reason. The Ninth Circuit correctly held in *Matthews* v. *Macanas*, 990 F.2d at 469 that Section 945.3 does not apply to federal criminal investigators and law enforcement officers, for Cal. Penal Code § 830.8(a) (West 1985) expressly provides that "federal criminal investigators and law enforcement officers are not California peace officers." Petitioners err in seeking to rely (Pet. 27) on *Harding* v. *Galceran*, *supra*. The tolling provisions of Cal. Gov't Code Section 945.3 were applicable in *Harding* because the plaintiff's suit was brought, under 42 U.S.C. 1983, against deputies of the San Dimas Sheriff's substation in Los Angeles—not against federal officers. 889 F.2d at 908.

thorized disclosures of tax return information. The claim that unauthorized disclosures were made is premised by petitioners on allegedly confidential information contained in (i) notices of proposed deficiencies sent by the Internal Revenue Service to Amcor partnerships and (ii) letters from the Internal Revenue Service to the Agricultural Stabilization and Conservation Service (Pet. 29). As the district court concluded, however, Amcor knew of the facts concerning the issuance of the letters to the Amcor partnerships by June 17, 1992—its internal memorandum of that date complains of "the impropriety of the * * * letters, the fraud contained in those letters, [and the] '*pattern* of blatant Government misconduct directed at AMCOR and its investors'" (Pet. App. 12).

Amcor also knew by December 19, 1991, of the allegedly unauthorized disclosure of information to the Department of Agriculture. The Olsen letter of that date, quoted by the district court, objected to the alleged governmental violation of "taxpayer privacy rules under Internal Revenue Code (Code) § 6103 * * * by illegally conducting administrative civil tax audits and criminal tax investigations with the Department of Agriculture and apparently sharing information about same" (Pet. App. 9).

On this record, the courts below correctly concluded that the statute of limitations expired before petitioners commenced this action. Further review of this factual determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 96-1661

In The

Supreme Court of the United States

October Term, 1996

AMCOR CAPITAL CORPORATION,
a Delaware corporation, et al.,

Petitioners,

v.

WILBUR GOOLKASIAN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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13 pp

LIST OF ALL PARTIES TO THE PROCEEDING AND LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES REQUIRED BY RULE 29.6

The list required by this Rule has already been provided in the Petition for Writ of Certiorari, filed on or about April 15, 1997.

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Petitioners Amcor Capital Corporation, a Delaware corporation; Fred H. Behrens, individually and a general partner for certain Amcor limited partnerships; and Robert A. Wright, individually and as general partner for certain Amcor limited partnerships (hereafter petitioners are referred to collectively as "Amcor" or "petitioners") hereby submit this brief in reply to the "Brief for the Respondents in Opposition" ("Opposition") filed by defendants and respondents herein. In the Opposition respondents/defendants (hereafter "defendants") contend that "[t]he decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted." (Opposition, p. 7.)

Defendants have completely missed the point. The statute of limitations in this case should have been tolled or should not have accrued at the outset because, among other things, (1) at least one conspiratorial act unequivocally occurred during even the shortest possible statutory period, (2) conflicting decisions of the court of appeals for the Ninth Circuit failed to provide certainty as to the applicable statute of limitations for *Bivens*[1] claims, and (3) the lower courts erred in failing to toll the statute of limitations based on defendants' fraudulent concealment of the facts relating to plaintiffs' claims. In addition, at

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[1] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

least on an equitable basis, the lower courts should have tolled the statute of limitations based upon the fact that a criminal investigation was pending. The lower courts erred in granting summary judgment because, as set forth below, triable issues of material fact existed which should have precluded a summary disposition.

II. AT LEAST ONE CONSPIRATORIAL ACT OCCURRED DURING EVEN THE SHORTEST POSSIBLE STATUTORY PERIOD

Defendants have not disputed the fact that on or about October 20, 1993 – a date within even the one-year statute of limitations period if that period of time is applicable (the original Complaint was filed on October 12, 1994)[2], an overt act occurred pursuant to the conspiracy alleged in the First Amended Complaint. The overt act in question was a letter sent by Gayle Morin, Assistant to the Commissioner of the Internal Revenue Service ("IRS") and one of the named defendants, to various United States Senators and Congressmen dated October 20, 1993 ("the October 20 letter"), in which she stated that the IRS had determined that the allegations concerning government misconduct relating to the facts of this case were unfounded. In fact, no such determination had been made. Nevertheless, Ms. Morin's conduct prevented the passage of a Private or Special Act of Congress which

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[2] As stated herein, plaintiffs dispute the applicability of any alleged one-year statute of limitations from the outset, in light of the fact that at all relevant times a conflict existed in the law of the Ninth Circuit court of appeals, as set forth more fully herein.

would have granted some relief to petitioners for the damage they had been suffering at the hands of the defendants. (Exc. 40, CR 40, pp. 10-13, ¶¶27, 32; Exc. 42, CR 42, pp. 8-9, ¶¶24-26.)

Defendants' contention with respect to this letter is as follows:

> The "evidence" on which petitioners rely appears to represent, if anything, allegations of "acts of concealment" rather than overt acts causing damage. It is well established in conspiracy law that "acts of concealment," committed after the central object of the conspiracy has been accomplished, and for the purpose of covering it up, are **not** part of the conspiracy for statute of limitations purposes.

(Opposition, pp. 12-13, footnote 8; emphasis in original; citations omitted.)

Defendants proceed from a thoroughly faulty premise. The October 20 letter is, plainly and simply, a lie. It is not merely an "act of concealment." It is a blatant and fundamental lie to Congress, made for the one and only purpose of inflicting harm on petitioners and denying them the right to redress their grievances. This letter does not merely accomplish or attempt to accomplish an act of concealment of prior wrongdoing. On the contrary, it affirmatively makes new and distinct factual allegations: that an investigation was conducted which exonerated defendants. In fact – and this fact is not disputed – such an investigation was never conducted. This was a material misrepresentation of fact. The purpose of the letter was to interfere with an attempt to pass legislation. This letter constitutes a violation of petitioners' constitutional

rights under the First Amendment to the United States Constitution to petition the legislative branch of government for redress of their grievances. It is a new and independent act designed to inflict further harm on petitioners – not merely to escape liability for harm previously inflicted – pursuant to the conspiracy. Summary judgment on the ground of statute of limitations was clearly inappropriate in light of such an allegation within even the briefest of the suggested statutory periods. At the very least, an issue of fact existed as to whether there was an overt act within the statutory period which would have mandated denial of the summary judgment motion.

It is irrelevant, for purposes of this analysis, whether the October 20 letter was specifically referred to, in so many words, in the First Amended Complaint. The allegations of the First Amended Complaint did not exclude such an allegation. Alternatively, the court in its discretion could have and should have, if there was any doubt, allowed an amendment, instead of terminating this case without recourse.

Accordingly, at the very least an issue of fact existed which should have precluded the entry of summary judgment on the basis of the statute of limitations. The lower courts should not have granted summary judgment in light of the sworn allegations in the Behrens Declaration regarding this letter.

III. CONFLICTING DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS SHOULD HAVE TOLLED THE STATUTE OF LIMITATIONS

Defendants state in their Opposition:

> Petitioners offer no authority in support of their contention (Pet. 16-18) that the statute of limitations should be tolled because of an unresolved intra-circuit conflict in the Ninth Circuit as to the applicable statute of limitations for *Bivens* suits. The intra-circuit conflict that petitioners describe is, in any event, illusory. . . .

(Opposition, p. 13; footnotes and citations omitted.) Defendants attempt to rationalize away the result in *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 343 (9th Cir.), *cert. denied*, 114 S.Ct. 95 (1993) (discussed in original Petition for Writ of Certiorari at 16-18), which applied a four-year statute of limitations as opposed to the one-year statute which defendants claim is universally recognized, by basically ignoring the case:

> In *Gerritsen* . . . , the Ninth Circuit – apparently unaware of its then-recent decision in *Van Strum* – applied the California four-year catch-all statute of limitations in holding that a *Bivens* action was time-barred. The facts of that case evidently did not require the court to determine whether the one-year statute of limitations applied instead. With the exception of *Gerritsen*, which appears to be an anomaly and contains "no analysis" (Pet. App. 22), the Ninth Circuit has uniformly applied the one-year statute of limitations to *Bivens* suits in cases that arose after this Court's decision in *Wilson v. Garcia, supra*.[3]

This analysis is simply incorrect, as well as being unnecessarily dismissive of prior decisions of the Ninth Circuit. *Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991)

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[3] 471 U.S. 261 (1985).

had been decided two years before *Gerritsen*. For defendants to contend that the Ninth Circuit was "unaware" of this then-two-year old decision when *Gerritsen* was decided is ludicrous. Moreover, defendants' analysis does not even attempt to explain the Ninth Circuit's decision in 1992, one year **after** *Van Strum* was decided, expressly not to overrule *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980), which had applied the four-year catch-all statute. *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992). Inexplicably, the *Pelletier* case is not even mentioned in defendants' Opposition.

Recent decisions of the Ninth Circuit therefore do not consistently apply the one-year statute of limitations, as defendants contend. In light of the uncertainty caused by this intra-circuit conflict, petitioners should have been given the benefit of the four-year statute of limitations. At the very least, because of the conflicting authorities, summary judgment should not have been granted on the basis that the applicable statute of limitations was one year as a matter of law.

IV. THE STATUTE OF LIMITATIONS SHOULD HAVE BEEN TOLLED OR SHOULD NOT HAVE ACCRUED BECAUSE OF FRAUDULENT CONCEALMENT

In *Hobson v. Wilson*, 737 F.2d 1, 35-37 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the D. C. Circuit held that the running of the statute of limitations is not triggered until the plaintiff has an awareness of sufficient facts to identify a particular cause of action and knows the identity of the persons responsible for his or her

injuries. Defendants have not cited any case to the contrary.

Here, petitioners were caught between the proverbial "rock and a hard place" in that, prior to their determination of what in their opinion constituted sufficient facts on which to bring the lawsuit in 1994, they could have filed such a suit, but it would have been (1) factually inaccurate in material respects and (2) in violation of Rule 11 of the Federal Rules of Civil Procedure. Respectfully, it was an abuse of discretion for the lower courts to hold that petitioners should have filed their lawsuit years previously when they had no effective means to discover the true facts, as they were under criminal investigation (although no charges were ever filed) and could not have conducted discovery in a civil action without waiving their Fifth Amendment privilege against self-incrimination.

V. THE STATUTE OF LIMITATIONS SHOULD AT LEAST HAVE BEEN EQUITABLY TOLLED BASED ON THE FACT THAT A CRIMINAL INVESTIGATION WAS PENDING

Defendants contend that California Government Code §945.3 does not toll the statute of limitations on the *Bivens* claims because the (1) the statute requires that a criminal proceeding must actually have been filed, and none was filed here, and (2) the statute, when construed together with California Penal Code §830.8(a), does not apply to claims for relief against federal criminal investigators and law enforcement officers such as those sued

here. Again, defendants miss petitioners' point. Petitioners are well aware that the statutory tolling provisions referred to above have been construed by the Ninth Circuit not to apply to federal criminal investigators and law enforcement officers. *Matthews v. Macanas*, 990 F.2d 467, 469 (9th Cir. 1993). However, petitioners contend that the statute of limitations should have been equitably tolled, at the very least, because no good ground exists in fact or in law to treat federal personnel differently from their state counterparts. In effect, petitioners are suggesting that *Matthews v. Macanas, supra,* was wrongly decided and that the distinction between federal and state personnel made in *Matthews* makes no logical sense, in view of the fact that, as stated in *Van Strum v. Lawn, supra,* "Actions under [42 U.S.C.] section 1983 and those under *Bivens* are identical save for the replacement of a state actor under section 1983 by a federal actor under *Bivens*." 940 F.2d at 409. Thus, this Court should express its disapproval of *Matthews* in the context of the instant case.

Moreover, the fact that no criminal charges were actually filed against petitioners is fortuitous and should not be dispositive on the issue of whether the statute of limitations should have been tolled. It is undisputed that a grand jury was empaneled and was conducting an investigation of petitioners for several years until April 1993. Obviously no evidence was discovered and as a result no charges were filed. Nevertheless, as stated above, forcing petitioners to file a civil lawsuit while they were under criminal investigation, however ill-founded, would have required them to waive their constitutional rights. No one should be forced to give up constitutional

rights in order to avoid a waiver of other such rights, which is exactly what happened here.

VI. CONCLUSION

For all of the reasons set forth above and in the Petition, petitioners request that the Petition be granted.

Respectfully submitted,

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